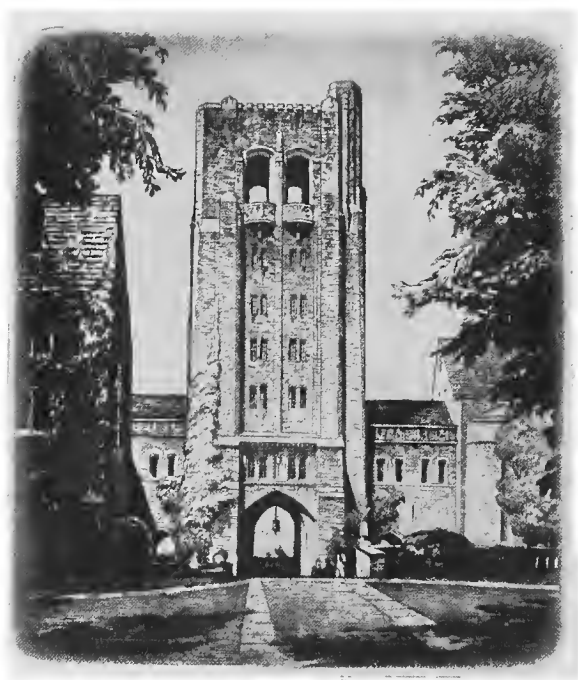


KF  
8950  
H43  
C.1



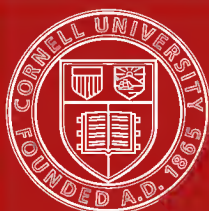
Cornell Law School Library

CORNELL UNIVER



3 1924 060 048 273

Hon Francis M. Finch  
Compliments of the author.



Cornell University  
Library

The original of this book is in  
the Cornell University Library.

There are no known copyright restrictions in  
the United States on the use of the text.

A TREATISE ON THE  
COMPETENCY AND RIGHTS

OF

WITNESSES AND PARTIES IN INTEREST

IN ALL ACTIONS OR PROCEEDINGS BEFORE

COURTS OR MAGISTRATES

WITH

AMERICAN AND ENGLISH DECISIONS

BY

RUSSEL HEADLEY

*Of the Newburgh Bar*

AUTHOR OF "ASSIGNMENTS FOR THE BENEFIT OF CREDITORS"

---

ALBANY, N. Y.  
MATTHEW BENDER  
1897

LAH 787

COPYRIGHT, 1897,

MATTHEW BENDER.

# TABLE OF CONTENTS.

---

## CHAPTER I.

### GENERAL PROVISIONS AS TO THE COMPETENCY AND RIGHTS OF WITNESSES.

Preliminary .....	Sec. 1
Oath of .....	2
Mode of taking .....	3
Competency of .....	4
Incompetency in general .....	5
Idiots and lunatics .....	6
Infancy .....	7
Question of competency for the court .....	8
Defect of religious belief .....	9
Unbelief how proved .....	10
Physical incapacity .....	11
Convict or infamous person .....	12

## CHAPTER II.

### DISPARAGING AND CRIMINATING QUESTIONS.

Exemption from answering disparaging questions .....	Sec. 13
Tending to disgrace .....	14
Illegal sale of thing in action .....	15
Bribery .....	16
Duelling .....	17
Gaming .....	18
Crimes against the public peace .....	19
Perjury .....	20

## CHAPTER III.

### DEFENDANT AND ACCOMPLICES.

The defendant as a witness .....	Sec. 21
Cross-examination of .....	22
Power of court over .....	23

Accomplices as witnesses.....	Sec. 24
Cross-examination of.....	25
Must be corroborated.....	26
Extent of corroboration.....	27
An accomplice defined.....	28
Decoys, detectives and spies.....	29

## CHAPTER IV.

## UNDER SECTIONS 829 AND 830 CODE CIVIL PROCEDURE.

Preliminary.....	Sec. 30
Application of. ....	31
Interest that disqualifies.....	32
What interest does not disqualify.....	33
Mortgagees and mortgagors.....	34
Promissory notes.....	35
Partnerships.....	36
Personal transactions.....	37
Claims against an estate.....	38
Books of account.....	39
Conversations that are incompetent.....	40
Conversations that are competent.....	41
Conversation between deceased and third persons... ..	42
The rule in other cases.....	43
Testimony in own behalf.....	44
In behalf of co-plaintiff or co-defendant.....	45
Administration.....	46
Deriving title or interest.....	47
Declarations of deceased.....	48
Negative and affirmative.....	49
Indirect evidence.....	50
Proceedings under the will.....	51
Objections to witness.....	52
Competency restored.....	53
Under section 830.....	54

## CHAPTER V.

## PRIVILEGED COMMUNICATIONS.

Preliminary.....	Sec. 55
Communications to an attorney .....	56
What relations must exist.....	57



## TABLE OF CONTENTS.

v

Cessation of relations.....	Sec. 58
Objections to testimony .....	59
Who decides as to relationship and privilege.....	60
What communications are privileged.....	61
What communications are not privileged.....	62
On probate of will.....	63
Waiver.....	64
Communications to physician.....	65
What are privileged.....	66
What are not privileged.....	67
Probate proceedings.....	68
Objections to testimony.....	69
Waiver .....	70
Communications to clergymen.....	71

## CHAPTER VI.

### HUSBAND AND WIFE.

Preliminary.....	Sec. 72
What are confidential communications .....	73
What are not confidential communications.....	74
Husband and wife as witnesses for, or against, the other.....	75
In actions for divorce.....	76
In actions for criminal conversation.....	77
In criminal cases.....	78
Crimes committed against each other.....	79

## CHAPTER VII.

### CONFESSIONS.

Statute regulating.....	Sec. 80
Preliminary.....	81
Knowledge of the language requisite.....	82
Weight of.....	83
Its weight for the jury.....	84
Identity of declarant must be proved.....	85
Confession must be voluntary.....	86
Induced by threats or compulsion.....	87
Illustrations.....	88
Threat or promise made indirectly.....	89

Confessions induced by promise of reward or favor or given under a stipulation.....	Sec. 90
Confessions of guilt other than the crime charged, made under inducements as to the latter.....	91
Inducements by one in authority.....	92
Statements made under duress.....	93
Induced by artifice or fraud.....	94
To officer or other person, while under arrest.....	95
Statement made before coroner.....	96
Judicial confessions.....	97
Statement, how taken.....	98
Statement unavailable for the defense.....	99
When the court holds a preliminary examination to determine competency of confession.....	100

# TABLE OF CASES.

A.		PAGE	
Adams v. Morrison.....	94	Bacon v. State.....	53
Albany Co. Sav. Bank v. Mc-		Badger v. Badger.....	120
Carthy.....	82, 148	Bailey v. Bailey.....	205, 207
Alberti v. N. Y., etc., R. R. Co.	194	Bailey v. State.....	237, 240
Aldermen v. People.....	168, 181	Baird, <i>Re</i> .....	186
Alexander v. Dutcher..	88, 129, 142	Baker v. State.....	238
Alexander v. Alexander.....	129	Balbo v. People.....	235
Allen v. Public Admr.....	180	Baldwin v. Smidt.....	92
Allen v. State.....	51, 53, 219	Ballou v. Ballou.....	134
Allison v. Barrow.....	203	Bank of Utica v. Mesereau..	165,
Allison v. State.....	48, 61		179, 182
Allis v. Spafford.....	89	Barker v. Kuhn.....	181, 200
Althouse v. Wells.....	168, 176	Barnes v. Camack .....	202
Amos v. State.....	249	Barnes v. Harris.....	167
Anderson v. State.....	30	Barnes v. State.....	249, 252
Andre v. Brodman.....	6	Barry v. Coville.....	171
Andrews v. Maberry.....	20, 24	Barry v. Eq. Life Assoc....	74, 136
Andrews v. Nat. Bank.....	74	Barrett v. Carter.....	138
Andrews v. Trye.....	35	Bartlett v. Burns.....	176
Angevine v. Angevine..	67, 74, 130	Barthelemy v. People.....	24
Arms, etc., Admrs., v. Middle-		Barton v. Scramling.....	68, 70
ton.....	117	Barum v. Fonts.....	167
Armstrong v. Noble.....	206	Bates v. U. S.....	59, 64
Armstrong v. People.....	171, 172	Baxter v. Baxter.....	120
Atherton's Case.....	50	Beach Est., <i>Re</i> .....	92
Atwood v. Milton.....	24	Beatty v. Clark..	116
Auburn Sav. Bank v. Brinker-		Beaver v. Taylor.....	117
hoff.....	143	Bedgood v. State .....	50
Austin v. People.....	233	Beery v. U. S.....	218
Austin, Matter of.....	179	Bell v. Bumsted.....	153
Avery v. Mattice.....	177	Bellows, <i>Re</i> .....	159
Aveson v. Kinnans.....	202	Benedict v. Driggs.....	88, 139
		Benedict v. Phelps.....	124
		Benedict v. State.....	167
		Benjamin v. Coventry.....	180
		Benjamin v. Demmick....	78, 118
		Bennet v. Austin .....	129

## B.

	PAGE		PAGE
Bernsee, <i>Re</i> .....	77, 125, 149	Brown v. People.....	218
Berrien, <i>Re</i> .....	151	Brown, <i>Re</i> .....	148
Berry v. Com.....	213, 214	Brown v. R. W., etc., R. R. Co.	189
Berry v. People.....	56, 60	Brown v. State.....	15, 30, 250
Bigler v. Rehner.....	181	Brown v. Third Ave. R. R. Co.	189
Birdsall v. Patterson.....	205, 206	Buchanan v. Miller.....	80
Blackburn v. Com.....	58	Buck v. Stanton.....	77
Blackus v. Burness.....	21	Budlong, <i>Re</i> .....	107, 163
Blackwell v. State.....	15	Bull v. Loveland.....	34
Blaesi v. Blaesi.....	147	Burke, <i>Re</i> .....	148, 155
Blair v. Lease.....	20	Burley v. Barnhard.....	81, 189
Blankman v. McQueen.....	102	Burnett v. Noble.....	68, 109
Blass v. Morrison.....	100	Burnett v. Phalon.....	36
Bobs v. Bryson.....	181	Burrows v. Butler.....	14
Bob v. State.....	251	Butler v. B. R. R. Co.....	188
Bockes v. Lansing.....	134	Butts v. Swartwood.....	20
Bogert v. Bogert.....	168	Byass v. Sullivan.....	36
Bostwick v. Gray.....	104	Byrd v. State.....	218
Boston v. Scramling.....	156		
Boughton v. Bogardus.....	102, 146, 152	<b>C.</b>	
Bowers v. Smith.....	112	Cadmus v. Oakley.....	133
Bowley v. State.....	45	Cahoon v. Com.....	173
Bowling v. Com.....	53	Cairn v. State.....	221
Bowry, <i>Re</i> .....	191	Callahan v. Clement.....	116
Boyd v. State.....	226	Callister, <i>Re</i> .....	87, 128, 132
Boyle v. Wiseman.....	35	Campbell v. Com.....	60, 236
Bradley v. Merrick.....	162	Campbell v. Hubbard.....	68, 105, 110, 155
Bradner v. Howard.....	89	Campbell v. McGuire.....	119
Braghan v. Gott.....	77	Campbell v. State.....	10, 11, 13
Brague v. Lord.....	110, 123, 125	Cannon v. N. W. M. L. I. Assn..	106
Brand v. Brand.....	166, 175	Capper v. U. S.....	221
Brandon v. People.....	43	Card v. Card.....	146, 153
Brandt v. Klein.....	178	Carey v. White.....	127
Brashear v. State.....	43	Carlson v. Winterson.....	6
Brayman v. Stephens.....	139	Carnes v. Platt.....	166, 181
Brennan v. Hale.....	122, 169, 175	Carney v. Wadhams.....	141
Brennan v. State.....	15	Carroll v. Davis.....	100
Brigham v. Gott.....	78, 184	Carroll v. Com.....	52
Brink v. Mulligan.....	20	Carroll v. State.....	49
Britton v. Lorenz.....	166, 173, 175	Carter v. State.....	14, 15, 250
Brown v. Brown.....	35, 130	Casey v. Casey.....	210
Brown v. Burgett.....	141	Cent. M. R. R. Co. v. Rocka-	
Brown's Case.....	47	fellow.....	20
Brown v. Com.....	217	Chadwick v. Fonner.....	128, 139, 158
Brown v. Klock.....	79	Challis v. Goddard.....	102
Brown v. Matthews.....	163	Chamberlin v. People.....	202
Brown v. Met. L. Ins. Co.....	197	Chamberlin v. Wilson.....	33, 35

## TABLE OF CASES.

ix

	PAGE		PAGE
Chapman, <i>Re</i> .....	179	Com. v. Morgan.....	45
Chase, <i>Re</i> .....	93, 179	Com. v. Mullins.....	19, 44, 45
Chellis v. Chapman .....	177	Com. v. Nott.....	218, 224
Chew v. Farm Bank.....	166	Com. v. Piper.....	250
Children's Aid Soc. v. Lover- idge.....	121	Com. v. Pratt.....	34
Childs v. State.....	53	Com. v. Price.....	34, 35, 50, 51, 54
Church v. Howard.....	73, 89, 130	Com. v. Sapp.....	209
Church v. Kidd.....	72	Com. v. Smith.....	24
Clark, <i>Re</i> .....	71, 149	Com. v. Snow.....	52
Clark v. Bruce.....	157	Com. v. Taylor.....	221
Clark v. McNeal.....	85, 121	Com. v. Webster.....	44
Clark v. State.....	44, 47	Com. v. Willard.....	60
Clarke v. Smith.....	138, 139, 142	Com. v. Wood.....	60, 236
Clift v. Moses.....	145	Com. v. Whitman.....	232
Close v. Olney.....	37, 58	Comins v. Hetfield....	107, 112, 162
Clough v. State.....	241, 247	Compton v. State.....	48
Cloyes v. Thayer.....	34	Comrs. of Excise v. Backus...	64
Coburn v. Odell.....	33, 35	Comstock v. Hier.....	93
Coffee v. State.....	235, 243	Conklin v. Conklin.....	101
Coffin v. Jones.....	202	Conklin v. Snyder.....	71, 122
Coleman, <i>Re</i> .....	171, 179, 181, 191, 193	Connelly v. O'Connor....	68, 83
Coleman v. Com.....	9, 16	Connelly v. Connor.....	73
Collins v. Mock.....	202	Connors, <i>Re</i> .....	191
Collins v. People.....	53	Connors v. People.....	43
Collins v. Robinson .....	177	Converse v. Cook.....	88, 90
Colt v. McConnell.....	175	Conway v. Moulton.....	94, 134
Colwell v. Colwell.....	207	Cooke v. Grange.....	202
Com. v. Bachelor.....	24	Coon v. People.....	15, 18
Com. v. Carey.....	15, 18	Coon v. Swan.....	167
Com. v. Clark.....	247	Cooper v. Monroe.....	81
Com. v. Coffee.....	224, 250	Copp v. Upham.....	34
Com. v. Cohen.....	60	Cornell v. Cornell....	93, 101, 119
Com. v. Cooper.....	27	Cornell v. Venatsdalen.....	202
Com. v. Culver.....	233, 250	Cornelius v. Hamburg.....	208
Com. v. Downing.....	58	Corning v. Walker.....	95, 160
Com. v. Drake.....	58	Costello v. Costello.....	200
Com. v. Giff.....	203	Cotton v. State.....	42, 67
Com. v. Graham.....	30	Coveney v. Tannahill.....	165
Com. v. Hanlon.....	235	Cowley v. People.....	44
Com. v. Harriman.....	246, 248	Cox v. Hill.....	34
Com. v. Hill.....	15, 25	Cox v. People.....	218, 227
Com. v. Holmes.....	52	Craft v. State.....	53, 56
Com. v. Holt.....	237	Crane v. Crane.....	100
Com. v. Hutchinson....	14, 15, 18	Crawford v. Haines.....	108
Com. v. Kaufman.....	22	Crawford v. McKissock.....	166
Com. v. Knapp.....	228, 231, 238	Crawford v. State.....	248
Com. v. Lannon.....	44	Crimmins v. Crimmins.....	203
		Cross v. Rutledge.....	200, 202

	PAGE		PAGE
Cross v. Smith.....	5, 152,	Dowd v. Donnelly.....	30
Crowe v. Brady.....	155	Draper v. Draper.....	14, 15
Crowly v. Davis.....	148	Dubois v. Baker.....	145
Crutchfield v. State.....	49	Dunham v. Jayne.....	145
Curtiss v. Knox.....	36	Dunham, Will of.....	125, 126, 148
Curtiss v. Stern.....	21	Dunn v. People.....	29
Curtiss v. Strong.....	24	Dyer v. Dyer.....	139, 142

## D.

Dakin as Excr., etc., v. Walton.	117
Darragh, <i>Re</i> .....	184
Davidson v. State.....	15
Davis, <i>Re</i> .....	128
Davis v. Gallagher.....	109, 122
Davis v. Marvine.....	75
Davis v. Seaman.....	117
De Baun, <i>Re</i> .....	58
Denham v. Jayne.....	107
Denise v. Denise.....	69, 144, 145
Dennis v. Crittenden.....	205
De Meli v. De Meli.....	206
De Verry v. Schuyler.....	93
Devinney v. Corey.....	67, 74
Devlin v. Greenwich Sav. Bank.....	126
Dewey v. Goodenough.....	79
De Wolfe v. Strades.....	167
Dexter v. Booth.....	202
Dickerman v. Graves.....	106
Dickinson v. Dickinson.....	207
Dickinson v. Duston.....	30
Dickinson v. State.....	247
Dilliber v. Home L. Ins. Co.	183, 187
Dinley v. McCullagh.....	115
Disque v. State.....	45
Ditmars v. Sacket.....	123
Dixon v. Vale.....	35
Dodge v. Brittain.....	61
Dodson v. State.....	237, 239
Doe v. Watkins.....	182
Donnelly v. State.....	23
Donohue v. People.....	30
Dooley v. Moan.....	116
Doolittle v. Stone.....	145
Dougherty v. Met. L. Ins. Co.	194
Doughty v. Doughty.....	150

## E.

Eberhart v. State.....	249
Eckert v. Eckert.....	120
Edington v. Ætna L. Ins. Co.	183, 184, 190
Edington v. Mut. L. Ins. Co.	184, 192
Ehrman v. Scheuman.....	68, 73
Eighmie v. Eighmie.....	124
Eighmie v. Taylor.....	126, 127
Eisenlord v. Clum.....	71
Elizabeth v. State.....	220
Ellis v. Filon.....	74
Ellis v. State.....	250, 251
Eskbridge v. State.....	214
Elmore v. Jaques.....	118
Elston, <i>Re</i> .....	179
Ely v. Clute.....	88
Emory's Case.....	33
Erwin v. Erwin.....	69, 126
Eysaman, <i>Re</i> .....	78, 105, 119, 125

## F.

Fairchild v. Bascomb.....	13, 26
Fanning v. Fanning.....	207
Farace v. Farace.....	200
Farley v. Norton.....	94
Farnsworth v. Ebbs.....	71, 120
Farrell v. Krum.....	107
Fay v. Gugnion.....	203
Feeny v. L. I., etc., R. R. Co.	188
Fellows v. Wilson.....	36
Fenton v. Eggleston.....	99
Finn v. Finn.....	205
Fire Assoc. v. Flemming.....	167
Fisher v. Fisher.....	183
Fisher v. Reynolds.....	38
Fisher v. Verplanck.....	111
Fitzgerald v. State.....	84

## TABLE OF CASES.

xi

	PAGE		PAGE
Flannagan v. State.....	14, 15, 18	Gogan, <i>Re</i> .....	80
Flemming v. State.....	26	Gomerich v. Ulrich.....	73
Floyd v. Miller.....	203	Goodwin v. Hirsch.....	96, 157, 158
Floyd v. State.....	33	Gordon v. Barney.....	85
Fogal v. Paige.....	71	Gotts v. People.....	220
Foley v. Royal Arcanum.....	197	Gourlay v. Hamilton.....	70
Foote v. Beecher. ....	133, 137, 152	Grattan v. Met. L. I. Co....	183,
Foster v. Hall.....	166		184, 185, 186
Foster v. Pierce.....	35	Grattan v. Nat. L. I. Co.....	183
Foster v. People.....	48, 50	Graves v. King.....	101, 136
Foster v. Wilkinson.....	176	Gray v. Coles.....	202
Fowler v. Fowler.....	204	Gray v. Gray.....	201
Fox v. Black.....	142	Great W. T. Co. v. Loomis..	37, 47
Fox v. Clark.....	90, 93	Gregory v. Fichtner.....	111, 145
Fox v. Terr.....	27	Green v. Com.....	30
Fraleigh v. Cadman.....	114	Green v. Edicks.....	94, 95
Fralick v. People.....	43	Green v. State.....	68
Frank v. Dillon.....	206	Greer v. Greer.....	99, 174
Franklin v. Pinkey.....	98	Greer v. State.....	220
Fratini v. Caslini.....	208	Griffin v. Smith.....	200, 202
Frazer, <i>Re</i> .....	67, 75, 106	Griggs v. Day.....	118
Frederick v. State.....	68	Gross v. Wilwood.....	71, 126
Freeman, <i>Re</i> .....	195	Gross v. State.....	218
Freeman v. Lawrence.....	110	Grosse v. State.....	232
Fries v. Bergen.....	38	Grossman v. Sup. Lodge.....	184
Furrow v. Chapin.....	206		

## H.

G.		H.	
Gadshen v. Woodward.....	36	Hacford v. Palmer.....	27
Gagan's Will, <i>Re</i> .....	181	Hadsall v. Scott.....	85, 130
Gage v. Gage.....	166, 168	Hall, <i>Re</i> .....	115
Gallager, <i>Re</i> .....	113	Hall v. Richardson. ....	102, 121, 136
Gannon v. People.....	203	Hall v. Roberts.....	75
Gardner v. Hirsch.....	158	Halsey, <i>Re</i> .....	192
Garvey v. Owens.....	134	Ham v. Van Orden. ....	152, 153
Geisenheimer v. Dodge.....	36	Hamilton v. People.....	51
Genet v. Ketcham.....	173	Hammond v. Schultz..	74, 129,
Genet v. Lawyer....	90, 130		158, 159
Gentry v. State.....	222	Hampton v. Roylan.....	176
German Sav. Bank v. Slade..	88, 93	Hanely, <i>Re</i> .....	68, 70, 79
Gibert v. Sanders....	146	Hannah, <i>Re</i> .....	191
Gillies v. Kreuder.....	133	Hard v. Ashley....	78, 103, 140, 159
Gillooley v. State.....	198	Harding v. State.....	237
Ginochio v. Porcella.....	137	Harrisburg, etc., Manufg. Co.	
Givens v. Com.....	18	v. Sloan.....	177
Godine v. Kidd.....	82	Hartegan v. Nagle.....	132
Goddard v. Gardner....	167	Hartman, <i>Re</i> .....	127
		Hartnung v. People.....	237

	PAGE		PAGE
Hatch v. Peugnet.....	68, 98	Howser v. Com.....	6
Haughey v. Wright.....	138	Hoyt, Estate of..	169, 173, 180, 186
Hay v. Muller.....	145	Hoyt v. Hoyt..	5, 154, 183, 191, 193
Head v. Feeter.....	124	Hoyt v. Jackson.....	165
Heath v. Broadway, etc., R. R. Co.....	182, 185	Hoyt v. Odell.....	12
Hebbard v. Haughian..	171, 174, 175	Hull v. Lyon.....	178
Hector v. State .....	218, 220, 249	Humfreville, Re.....	142
Heldt v. State.....	43	Humphrey v. Sweeting.....	81
Hemmingway v. Smith.....	181	Hunn v. Hunn.....	187
Hendrickson v. People....	241, 243	Hunscombe v. Hunscombe..	22, 23
Henry v. Bank.....	36	Hunt v. P. & S. C. Co.....	103
Henry v. N. Y., etc., R. R. Co.	182	Hunter v. Herrick.....	92, 94
Herrington v. Winn...99, 105, 183, 192		Hunter v. Watson.....	172
Hewitt, Re.....	105	Huntley v. Huntley.....	207
Hewitt v. Prime.....	188	Hurlburt v. Hurlburt....	106, 175
Heyne v. Doeffler.....	69, 97, 118		
Hicks v. Alexander.....	113	I.	
Higden v. Head.....	37	Irish v. Horn.....	117
Hier v. Grant.....	147	Irsch v. Irsch.....	25, 67
Hildebrant v. Crawford...84,	127	Irwin v. State.....	52
Hill v. Hotchkin.....	130	Isler v. Dewey.....	26
Hill v. Woolsey.....	73		
Hill v. State.....	15	J.	
Hill v. Heermans.....	138, 144	Jackson v. Com.....	220
Hoar v. Hoar.....	153, 154	Jackson v. French .....	167
Hobart v. Hobart....6, 68, 80, 81, 153, 154		Jackson v. Gridley.....	15, 24
Holcomb v. Campbell.....	86	Jackson v. McClure.....	84
Holcomb v. Holcomb...9, 10, 11, 12, 13, 79, 105, 119, 125,	127	Jackson v. McVey.....	178
Holden v. Met. L. Ins. Co....	190	Jackson v. State.....	238
Hollands v. Willett.....	70	Jacobs v. Hester.....	203
Hollenbeck v. McGibbons....	177	Jacques v. Elmore.....	143
Holst v. State.....	17	Jauvin v. Scammond.....	37
Honneycutt v. State....219, 225		Jefferds v. People.....	235
Hoover v. State.....	224, 234	Jeffrey v. Com.....	49
Hope v. T. & L. R. R. Co....	195	Jenkinson v. State.....	166
Hopkins, Re.....	149	Jennie v. Marble.....	200
Hopkins v. Clarke....82, 112, 136		Johnson v. Cochrane.....	120
Hopt v. Utah.....	238, 249	Johnson v. Daverne.....	172
Hortenaie v. Kaufman.....	35	Johnson v. Johnson.....	182, 192
Hosenbok v. State.....	250	Johnson v. Spies.....	100, 137
Houlthausen v. Pondir.....	178	Johnson v. State...15, 30, 63,	209
Howe v. Schweinberg.....	160	Jones v. Brooklyn, etc., Co..	16, 188, 196
Howell v. Mainwaring.....	86	Jones v. Harris.....	21
Howell v. Taylor.....93, 98, 119		Jones v. People.....	15, 19
		Jones v. State.....	51, 178
		Jordan v. State.....	221



	PAGE	PAGE
<b>K.</b>		
Kale v. Elliott.....	94, 95	Lewis v. Lewis..... 149
Keator v. Demmick.....	200, 203	Lewis v. Merritt..... 94, 141, 159
Kerry v. Dimon ..	149	Lindsay v. People..... 49
Kellenberger v. People.....	221	Lines v. State..... 200, 202
Keller v. West., etc., Mfg. Co..	77	Livingston v. Harris..... 36
Kelley v. Levy.....	189	Livingston v. Kiersted.. 10, 13, 26
Kellogg, Re.....	106	Lobdell v. Lobdell..... 67, 127, 128
Kelly v. Burroughs.....	91, 157	Lockwood v. House..... 170
Kelsey v. Cooly.....	83	Loder v. Whelpley... 151, 161, 191
Kendall v. Gray.....	186	Logston v. State..... 17
Kendall v. May.....	11, 13	Lohman v. People..... 37
Kendall v. State.....	214	Lopez v. State..... 231
Keone v. People.....	44	Loveridge v. Hill..... 170
Kerr v. McGuire.....	156	Lowenstein's Will, Re..... 183
Ketcham v. Holden.....	84, 99	Lucre v. State..... 49
Ketchy v. State.....	26	Luetchford v. Lord..... 85
King v. Barrett.....	180	Lumpkins v. State..... 53
King v. State.....	237	Lyon v. Ricker..... 159
Kip, Matter of.....	34	Lyon v. Snyder..... 136
Kirby v. State.....	245	Lyon v. Whittaker..... 133
Kitchen v. Taylor.....	110	
Klock v. Brennan.....	78	<b>M.</b>
Knight v. Cunningham.....	117	Macdonald v. Woodbury..... 162
Kohler v. Adler.....	106	Maclay v. Robinson..... 114
Kolasky v. Michels.....	107	Mackay, Re..... 149
Kommisky v. Kommisky.....	108	Makesy v. People..... 58
Kraushaar v. Meyer.....	126	Mandeville v. Guernsey..... 169
		Manning v. Schmidt..... 95
<b>L.</b>		March v. Ludlum..... 166
Lambert v. State.....	218	Markell v. Benson..... 157, 158
Landy, Re.....	149	Marler v. State..... 50
Lane v. Lane.. 75, 77, 125, 127,	150	Marsh v. Brown..... 68, 118, 157
La Rose v. Com.....	218	Marsh v. Howe..... 168
Lasak, Re.....	74	Marsh v. Ne-ha-sa-ne Park... 133, 137
Lashear v. Croissant.....	81	Marx v. Man. R. R. Co.. 196
Lathrop v. Hopkins.....	81	Mason v. Mason..... 95
Lawson v. Jones.....	162	Mason v. Prendergast.... 103, 135
Lawton v. Sayles.....	96	Mason v. Williams..... 165, 191
Le Baron, Re.....	67, 75	Massey v. State..... 238
Le Beau v. People.....	47	Masterton, Re..... 68
Lee v. Henderson...	37	Masterton v. Bryce..... 180
Lee v. Dill.....	149	Matteson v. N. Y. C., etc., R. Co..... 206
Lee v. State.....	48, 49	Mathews v. Com..... 195
Lerche v. Brasher.....	110	Maverick v. Marvel..... 104, 140
Levin v. Russee.....	5, 152, 154	Maynard v. Vinton..... 201
Lewis, Re.....	81	

	PAGE		PAGE
Mayo v. Mayo.....	34, 35	Moden v. Cattenoch.....	23
McArthur's Will, <i>Re</i> .....	105	Molter, Estate of.....	132, 138
McCabe v. Com.....	237	Montgomery, Matter of.....	67
McCarthy, <i>Re</i> .....	178, 179	Montgomery v. Pickering.....	200
McCarthy v. McCarthy.....	208	Moore v. Oviatt.....	68, 71
McClure v. Goodenough.....	170	Moore v. Patterson.....	202
McCormick v. N. & A. Assoc..	190	Moore v. Tracey.....	58
McCreery v. Ghormley.....	33	Moore v. Wingate.....	200
McCutcheon v. Pique.....	27	Morehouse v. Morehouse.....	162
McDonald v. Woodbury.....	129	Morgan v. Hyatt.....	206
McElroy v. Sav. Bank.....	114	Morris v. Cain.....	169
McElroy v. State.....	225	Morris v. N. Y., etc., R. R. Co.	195
McGuire v. People.....	15	Mortimer v. Chambers.....	90
McIntire v. Costello.....	171	Mosner v. Rawlin.....	107, 108
McKenna, <i>Re</i> .....	109	Mosner v. State.....	17
McKenna v. Bolger.....	142	Mott v. Cons. Ice Co.....	189
McKensie v. State.....	48	Moyer v. Moyer.....	123
McKinney v. Grand St., etc., R. R. Co.....	194	Mulford v. Muller.....	175, 176
McLaughlan, <i>Re</i> .....	121	Mullins v. Chickering.....	101
McLellan v. Longfellow.....	166	Mulqueen v. Duffy.....	139
McMillan v. Stern.....	90	Murphy, <i>Re</i> .....	193
McMurray v. McMurray.....	85	Murphy v. N. C., etc., R. R. Co.	163
McMurray v. Innis.....	144	Murphy v. People.....	223, 237, 239
McNail v. Leigler.....	206	Murphy v. State.....	226
McNeaney, <i>Re</i> .....	89	Murray v. Fox.....	77
McQueen's Estate.....	189	Murray v. Milney.....	201
McTavish v. Denning.....	177	Murray v. State.....	250, 252
Meloy v. State.....	221	Musgrove, Matter of.....	67
Merchants, Estate of, <i>Re</i> .....	112	Mut. L. Ins. Co. v. Casey.....	174
Merrill v. Brunner.....	96	Myer v. Dorman.....	169
Merritt v. Campbell.....	160	Myer v. Hunt.....	139
Metzer v. State.....	2, 181, 251		
Meyers v. Dorman.....	169		
Meyers v. State.....	48		
Milan v. State.....	166		
Miller v. Adkins.....	160		
Miller v. Davis.....	92, 181, 189		
Miller v. McGucken.....	162		
Miller v. Montgomery.....	70, 155, 156		
Miller v. People.....	221		
Miller v. State.....	220		
Mills v. Kernochan.....	156		
Mills v. Mills.....	102, 140		
Milman v. Tusker.....	35		
Minier v. Minier.....	205		
Mitchell's Case.....	170		
Mitchel, Estate of.....	173, 174		

## TABLE OF CASES.

XV

	PAGE		PAGE
Nomack v. State.....	228	People <i>ex rel.</i> v. Burgman..	162, 163
Norfolk v. Gaylord.....	35	People v. Buchanan.....	177
Numrich v. Sup. Lodge.....	190	People v. Bulanger.....	61
		People v. Carpenter.....	209
O.		People v. Casey.....	30, 43, 45, 47
O'Brien <i>et al.</i> v. Weiler....	127, 151, 161	People v. Chacon.....	237
O'Brien v. People.....	237	People v. Chaplain.....	31, 212
O'Connor v. Majorbanks.....	202	People v. Christian.....	56
Odell v. Kapper.....	24	People v. Chapleau.....	244
Odell v. Solomon.....	162	People v. Clark.....	47
Olcott v. Kohlsaatt.....	135	People v. Cleveland.....	58
Oliver v. Freleigh.....	97, 106	People v. Clough.....	53
O'Neil, <i>Re</i> .....	149, 151, 178, 191	People v. Conroy.....	43, 44
Orchmund v. Barker.....	4	People v. Cook.....	5
O'Rourke, <i>Re</i> .....	72	People v. Costello.....	48
Owen v. State.....	218	People v. Courtney..	42, 43, 53, 56, 57
		People v. Cox.....	237, 240
P.		People v. Crapo.....	31, 47, 48
Paige, <i>Re</i> .....	70, 98	People v. Davis.....	53
Palmer, <i>Re</i> .....	104	People v. Deacons.....	237, 240
Palmateer, <i>Re</i> .....	150	People v. De Soto.....	249
Parker v. Carter.....	166, 167	People v. Druse..	218, 235, 236, 237
Parks v. Andrews.....	143	People v. Elliott.....	56, 57
Parkhurst v. Berdell.....	201	People v. Emerson.....	60
Parhan v. Moran.....	120, 131	People v. Evans.....	53
Parsons v. State.....	48	People v. Everhardt....	58
Patten v. N. L., etc., Assoc....	186	People v. Everson.....	55
Patten v. U. L., etc., Assoc....	187	People v. Farrell.....	59, 60
Patterson v. Copeland.....	124	People v. Fitzpatrick.....	209
Patterson v. N. Y., etc., R. R. Co.....	205	People <i>ex rel.</i> Taylor v. Forbes.	38
Patton v. Moore.....	172	People v. Fox.....	231, 249, 250
Patton v. Wilson.....	202	People v. Fresham.....	35
Payne v. Kerr.....	122	People v. Gallagher.....	178
Pearsall v. Elmer....	169, 178, 180	People v. Garnett.....	48
Pease v. Barnett.....	143	People v. Gastro.....	239
People v. Ah Ki.....	220	People v. Gates.....	198
People v. Barrie.....	59, 233	People v. Gillabert.....	213
People v. Barker.....	167, 188, 250	People v. Gilon.....	165
People v. Bartholp.....	205	People v. Gindici.....	43
People v. Bennett.....	216	People v. Harris.....	190
People v. Blakelee.....	165	People v. Hendrickson.....	245
People v. Bliven.....	59	People v. Hess.....	169
People v. Brower.....	188	People v. Hoch.....	185
People v. Brown.....	31, 34, 47	People v. Hoogkerk.....	56
		People v. Houselman.....	61
		People v. Hovey.....	44
		People v. Hoy Ten.....	220

	PAGE		PAGE
People v. Irving.....	30, 46	People v. Ross.....	12
People v. Jaehne.....	237	People v. Ryland.....	56
People v. James.....	45, 46	People v. Satterlee.....	30
People v. Johnson.....	222	People v. Schuyler....	182, 186, 190, 196
People v. Kelly.....	245, 247	People v. Sharp.....	39, 56
People v. Kerr.....	56	People v. Sheriff.....	174
People v. Kurtz.....	217, 219, 229, 249, 250	People v. Sherman.....	56
People v. Langtree.....	50	People v. Singer.....	219
People v. Linsey.....	16	People v. Sliney.....	186
People v. Macemey.....	241	People v. Smith.....	17, 59, 60, 221
People v. Mahoney.....	53	People v. Stewart.....	168
People v. Mananson.....	35	People v. Sweeny.....	44
People v. Martinez.....	243	People v. Spencer.....	40
People v. Master.....	44	People v. Stott.....	246
People v. McCallam....	56, 212, 222	People v. Stout.....	184
People v. McGee.....	9, 26	People v. Teachout.....	241, 247
People v. McGloin....	29, 223, 244	People v. Thayer.....	241
People v. McMahan....	218, 237, 242, 243, 245, 246, 247	People v. Thompson.....	53, 56
People v. McNair.....	14	People v. Thomas.....	214, 223
People v. Mercein.....	209	People v. Thoms.....	219
People v. Minisci.....	214	People v. Wayman.....	56
People v. Moett.....	43	People v. Wentworth.....	208
People v. Mondon....	212, 218, 241-246	People v. Wentz.....	218, 223, 226, 230, 238, 241
People v. Murphy....	185, 193, 241	People v. Whipple.....	48
People v. Noelke.....	46, 47, 60	People v. Wiley.....	58
People v. Northrup.....	209	People v. Wolcott....	226, 227, 228, 233
People v. O'Brien.....	53	People v. Wood.....	209
People v. Ogle.....	54, 59	People v. Vedder.....	59
People <i>ex rel.</i> Phelps v. Oyer and Terminer.....	37, 44	People v. Yeaton.....	237
People v. O'Neil....	29, 49, 56, 228, 231	Peck v. Williams.....	174
People v. Palmer.....	245	Perkins v. State.....	230
People <i>ex rel.</i> v. Pascal.....	30	Perry v. People.....	31
People v. Penhollow....	215, 245	Perry's Case... ..	22
People v. Perrotti.....	37	Peters v. Peters.....	107
People v. Petmecky.....	208	Peterson v. State.....	15, 19, 20
People v. Phillips.....	218	Petmecky v. People.....	200
People v. Plath.....	55	Petrie v. Petrie.....	125
People v. Porton.....	218	Pettit v. Geesler.....	94, 97, 158
People v. Ricker.....	56	Pfohe, <i>Re</i> .....	113
People v. Ring.....	56	Phelin v. Kenderdine....	33, 36
People <i>ex rel.</i> Brugman v. Ris- ley.....	245	Pickstay v. Starr.....	115
People v. Rogers.....	237, 238	Pierson v. People.....	190
		Pierson v. Steortz.....	166
		Pike's Case.....	18
		Pillow v. Thomas.....	200, 202

## TABLE OF CASES.

xvii

	PAGE		PAGE
Pinney v. Orth...	120, 140, 141, 159	Reg v. Owen.....	247
Pinkard v. State.....	35	Reg v. Pearce.....	209
Plane Mfg. Co. v. Trawley..	168, 169	Reg v. Taylor.....	209
Platner v. Platner.....	84, 214	Reg v. Whalen....	249
Pleasant v. State.....	37	Renihan v. Dennin... 168, 183, 185	
Pollock v. Pollock.....	54	Resignee v. Mason.....	107
Pool v. Perrott.....	33	Reynell v. Sprye.....	182
Pope v. Allen.....	133	Rex v. Azire.....	209
Porter v. Dunn....	112, 136	Rex v. Brazier.....	15, 18
Porter v. State.....	228, 230	Rex v. Burley.....	231, 236
Potter, Re.....	148	Rex v. Carrington.....	236
Potts v. Mayor.....	90, 160	Rex v. Castlehaven.....	209
Poucher v. Scott....	75, 119	Rex v. Cleeves.....	230
Powell v. Murphy.....	119	Rex v. Davis.....	243
Pratt v. Delavan .....	203	Rex v. Garbett.....	35
Pratt v. Elkins.....	84	Rex v. Gilham.....	197
Price v. Brown.....	147	Rex v. Griffin.....	198
Price v. Price.....	124	Rex v. Harding.....	225
Price v. State.....	218, 235, 236	Rex v. Hearn.....	232
Prouty v. Eaton.....	175	Rex v. Hill.....	11, 12
Purdy, Re, v. Stewart.....	67	Rex v. Lewis.....	243, 247
Pursell v. Fry.....	112	Rex v. Moore.....	231
		Rex v. Mullins.....	60
		Rex v. Nookes.....	54
		Rex v. Perkins.....	19
		Rex v. Powell.....	15
		Rex v. Spark.....	197
		Rex v. Rudd.....	231
		Rex v. Taylor.....	23
		Rex v. Webb.....	246
		Rex v. White.....	19, 23
		Rex v. Whitehead.....	6
		Rhodes v. Selin.....	172
		Rice v. Mottley.....	129, 162
		Richardson v. Warner.....	92
		Richmond v. State.....	33, 37
		Riggs v. Am. H. M. Soc.....	79
		Rix v. Hunt....	101, 109, 114, 141
		Rizzolo v. Com.....	237
		Robbins v. Pultz.....	160
		Robinson v. Chadwick.....	200
		Robinson v. Kemp.....	173
		Robb's Appeal.....	202
		Rochester City Bank v. Suy-	
		dam.....	168
		Rockwell v. Peck.....	83
		Rodman v. Hoop.....	117
		Rogers, Re.....	114

## Q.

Queen v. People.....	42
Queen's Case.....	23
Queen's Estate....	99, 110
Quinby v. Strauss.....	152

## R.

R—— v. Luffé.....	201
R—— v. Reading.....	201
Ramscar, Re.....	245
Rand v. Grote.....	72
Ratcliff v. Wales.....	202, 208
Raubitschek v. Blank.....	103
Real v. People.....	214, 215
Record v. Saratoga.....	193
Rector v. Com.....	218
Redfield v. Redfield....	74
Redfield v. Stitt.....	91, 143
Redmond v. Ind., etc., Assoc..	187
Reeve v. Crosby.....	121
Reever v. Herr.....	200
Reg v. Guthridge.....	26
Reg v. Megson.....	26

	PAGE		PAGE
Rogers v. Dave.....	172	Sheldon v. Sheldon.....	96, 174
Rogers v. Decker.....	36	Sheridan v. Houghton.....	179
Rogers v. McGuire.....	158	Sherlock v. Whitney.....	21
Rogers v. Rogers... ..	157, 158	Sherman v. Kaufman.....	68
Roland v. Pinckney.....	138	Sherman v. Pickens.....	80
Root v. Wright.....	166, 172	Sherman v. Scott...68, 122, 173,	175
Rose v. Wakeman.....	35	Shirley v. Bennett.....	83, 98
Rosenberg v. Rosenberg.....	173	Short v. State.....	37
Ross v. Harden.....	109, 123, 124	Shurtcliff v. Willard.....	6
Ross v. Ross.....	92, 110	Sibley v. Waffle.....	166, 172
Ross v. State.....	237	Sigel v. Sigel.....	207
Rousseau v. Bleau...168, 170,	174	Simmons v. Havens.....	127, 134
Rufer v. State.....	249	Simmons v. Healster.....	33
Ruloff v. People.....	42	Simmons v. State.....	249
Rushton's Case.....	26	Simon v. Cloffy.....	149
Rutherford v. Com.....	220	Simon's Case.....	203
Ryan v. People .....	31, 47	Simons v. State.....	20, 228, 230
		Simpson, Re.....	111
		Sims v. Sims.....	30
		Sloan v. N. Y., etc., R. R. Co..	187
		Smith, Re.....75, 77, 138, 149,	150
		Smith v. Christopher.....	157
		Smith v. Coffin.....	21, 24
		Smith v. Crego.....	175, 180
		Smith v. Cross.....	85, 133
		Smith v. Hathorn.....	87
		Smith v. Hazard.....	85
		Smith v. Meaghan.....	80, 84
		Smith v. O'Brien.....	208
		Smith v. Sergeant.....	90
		Smith v. Smith.....	165, 175
		Smith v. State.....	221, 226
		Smith v. Ulman.....	119, 123
		Smith, Will of.....	133
		Snyder v. Natims.....	26
		Snyder v. Sherman.....	67, 77, 151
		Somerville v. Crook.....	110, 152
		Sommer v. Oppenheim.....	171
		Southard v. Rexford.....	34
		Southwick v. Southwick..	205, 206
		Spears v. Ohio.....	221
		Speers v. Snell.....	15
		Speiden v. State.....	62
		Spicer v. Spicer.....	147
		Spicer v. State.....	233
		Spiegel v. Hays.....	43
		Spies v. People.....	44, 45
		Spradling v. Conway.....	202
<b>S.</b>			
Sacia v. Decker.....	29, 155		
Sage v. Dorr.....	111		
Salander v. People.....	48		
Sallade v. Gerlach.....	91		
Sandberger v. Gorham.....	167		
Sandford v. Frost.....	173		
Sands v. Sparling.....	82		
Sanford v. Ellithorp..69, 100,			
	152, 153		
Sanford v. Sanford.....	160		
Sarah v. State.....	220		
Saratoga Co. Bank v. Leach...	88		
Satterlee v. Bliss... ..	166		
Saunders v. People.....	63		
Saunders v. State.....	44, 45		
Savercool v. Wilsey.....	82, 155		
Say v. State.....	223		
Scanlon v. Doherty.....	173		
Scherrer, Estate of.....	151		
Schoonmaker v. Walford...6,			
	79, 148, 151, 152, 154		
Schufeldt v. Watrous.....	72, 174		
Scott v. Hooper.....	21		
Scott v. Scott.....	105		
Selden v. State.....	173		
Semple v. Frost.....	167		
Severn v. Nat. Bank.....	67, 103		
Sharon v. Sharon.....	168		

## TABLE OF CASES.

xix

	PAGE		PAGE
Sprague v. Swift.....	87	State v. Guy.....	220, 238
Stallings v. Georgia.....	250	State v. Harper.....	24
Stanley v. Van Alstyne.....	140	State v. Hazelton.....	166
Stanley v. Whitney...138, 139,	142	State v. Hogan...219, 220, 226,	236
State v. Anderson...220, 222,	249	State v. Holland.....	53
State v. Avery.....	214	State v. Hopkins..218, 220, 226,	235
State v. Bayne.....	53	State v. Hoyer.....	53
State v. Betsall.....	53	State v. Hoyt.....	203
State v. Blake.....33, 35		State v. Huff.....44, 45	
State v. Bostwick.....218, 221		State v. Huson.....	214
State v. Boughton.....	246	State v. Isaacs.....	248
State v. Brockman.....	218	State v. Jackson.....	15
State v. Brooks.....235, 236		State v. Jansen.....	61
State v. Brown.....215, 252		State v. Johnson.....228, 229	
State v. Buffington.....203, 204		State v. Jones...219, 220, 226,	236
State v. Carlisle.....	237	State v. K——.....	35
State v. Carrick.....218, 227		State v. Kelly.....	13
State v. Carter.....	203	State v. Kinder.....249, 250	
State v. Christopher.....	237	State v. Kirby.....	233
State v. Chyo Chiack.....	52	State v. La Blanc.....	18
State v. Cooper.....	21	State v. Lamb.....	245
State v. Corson.....	46	State v. Lattin.....	19
State v. Cousins.....	44	State v. Litchfield.....	63
State v. Cowan.....	220	State v. Lowhorne.....226, 233	
State v. Crowley.....	48	State v. Marshall.....33, 37	
State v. Crowson.....	224	State v. McCord.....	200
State v. Dammeray.....	6	State v. McKean.....59, 60	
State v. Davidson.....	210	State v. McLaughlin.....	237
State v. Davis.....209, 249		State v. McLean.....	236
State v. Dawson.....166, 170		State v. Merchant.....	176
State v. Day.....218, 221, 226,	233	State v. Meyers.....	249
State v. Demareste.....237, 239		State v. Monnan.....	250
State v. Denis.....	15	State v. Mora.....	18
State v. De Wolfe.....15, 25		State v. Moran.....	231
State v. Dietz.....	48	State v. Moren.....	15
State v. Dougherty.....14, 15		State v. Mock.....	215
State v. Drake.....	252	State v. Moon.....	58
State v. Dyer.....	209	State v. Motley... ..	220
State v. Edwards.....15, 19		State v. Murphy.....	209
State v. Fisher.....	35	State v. Nelson.....	221
State v. Foster.....	217	State v. Nichols.....	35
State v. Freeman.....	218	State v. Ober.....	44
State v. Garvey...243, 246,	248	State v. O'Brien.....	49
State v. George.....	238	State v. Olin.....	33
State v. Gigher.....	49	State v. Patterson.....223, 237	
State v. Guild... ..218, 221,	252	State v. Pattie.....	49
State v. Gossett.....	218	State v. Pattier.....	53
State v. Grant.....	220	State v. Petty.....	21





## TABLE OF CASES.

xxi

	PAGE
Train v. State.....	30
Treanor v. Man. R. Co.....	196
Trimmer v. Trimmer.....	158
Trustees, etc., v. Moore.....	59
Trustees, etc., v. O'Malley..	60, 61

## U.

Underhill v. Nichols.....	110, 137
Upton v. State.....	53
U. S. v. Barlow.....	248
U. S. v. Cottingham.....	59, 64
U. S. v. Felton.....	209
U. S. v. Hanway.....	49
U. S. v. Hinz.....	50, 54
U. S. v. Humphreys.....	220
U. S. v. Hunter.....	49
U. S. v. Jones.....	200
U. S. v. Kennedy.....	21
U. S. v. Kirkwood.....	230
U. S. v. Moore.....	59, 64
U. S. v. Moses.....	37
U. S. v. Prior.....	248
U. S. v. Richards.....	220
U. S. v. Slenker.....	64
U. S. v. Smallwood.....	209
U. S. v. Stone.....	250
U. S. v. Troax.....	52
U. S. v. Wardell.....	252
U. S. v. Whittier.....	59, 63, 64
U. S. v. Wilson.....	248

## V.

Vail v. Craig.....	162
Valensin v. Valensin.....	197
Vandever v. Vandever.....	101
Van Allen v. Gordon.....	196
Van Alstyne v. Smith.....	174
Van Deusen v. Sweet.....	13
Van Gilder v. Van Gilder....	93
Van Orman v. Van Orman....	191
Van Tuyl v. Van Tuyl.....	205
Van Vechten v. Van Vechten.	104, 144
Varnum v. Hart.....	162
Vaughan v. Com.....	233
Veitus v. Hagge.....	6
Viall v. Leavens.....	147

	PAGE
Vinant v. State.....	15, 17
Volkavitch v. Com.....	250
Voorhis, Re.....	77, 132

## W.

Wachter, Re.....	114, 115
Wade v. State.....	15
Wadsworth v. Heermans....	144
Wakefield v. Ross.....	21
Waldron, Estate of.....	134
Walker v. Sanborn.....	200, 202
Walker v. State.....	221, 246
Wallace v. Strauss.....	68, 70
Walsh v. McArdle.....	139
Ward v. Holmes.....	87
Ward v. Plato.....	158
Ward v. Sharp.....	34
Warwickshall's Case.....	216
Warner v. Lucas.....	33
Warner v. Pres. P. Co....	201, 202
Warner v. State.....	15, 18
Warren v. State.....	220
Washburn v. People.....	15, 18
Washington v. Bedford.....	201
Waterhouse v. Gilman.....	86
Waver v. Waver.....	104
Wehrkamp v. Willett.....	205
Westover v. Aetna L. I. Co.	179, 187
Wheelan v. Yoston.....	115
Wheeler v. Hunt.....	96
Wheelock v. Cuyler.....	134
Whelpley v. Loder.....	121, 180
Whepp v. State.....	209, 210
White v. State.....	176
White v. White ....	131, 135, 156
Whitehead v. Smith.....	86
Whiting v. Barney.....	175
Whiting's Case.....	243
Whitman v. Foley.....	84
Wilcox v. Corwin.....	87
Wilcox v. Dodge.....	155
Wilkins v. Baker.....	72, 89
Wilkins v. English.....	119
Wilkinson v. Baldwin.....	202
Willett v. People....	228, 230, 249
Williams v. Davis.....	109, 140



# THE COMPETENCY AND RIGHTS OF WITNESSES.

---

## CHAPTER I.

### GENERAL PROVISIONS AS TO THE RIGHTS AND COMPETENCY OF WITNESSES.

- Sec. 1. Preliminary.  
2. Oath of.  
3. Mode of taking.  
4. Competency of.  
5. Incompetency in general.  
6. Idiots and lunatics.  
7. Infancy.  
8. Questions of competency for the court.  
9. Defect of religious belief.  
10. Unbelief, how proved.  
11. Physical incapacity.  
12. Convict or infamous person.

§ 1. **Preliminary.** The mode of compelling the attendance of a witness at a trial or proceeding, together with the means employed to secure upon such investigation the presence of all papers or documents which may be required, and which are at the time in the possession or custody of parties other than the person desiring them, are all now regulated by statute, and are too well known and familiar to every practitioner to render a discussion upon that topic necessary in this work. Neither is it within our present scope to treat upon the power of the court to punish witnesses for contempt, what conduct constitutes a contempt of court in regard to the disobedi-

ence of its mandates, nor the fees which witnesses are entitled to, since they all properly come within well-known statutory provisions. The object of this work is to treat of the duties, liabilities and privileges of a witness after he has finally appeared in court, in obedience to a properly authorized mandate of a court of competent jurisdiction,—both in regard to his competency, character, testimony, and the manner and mode of extracting it, after he has been deemed properly qualified to testify, and also to discuss those rules which govern him and the court, and relate to and regulate his testimony and the manner of examination.

The mode of perpetuating testimony, or of using upon a subsequent trial the evidence which was given upon the prior trial, by a witness since deceased, or whose attendance cannot be obtained, will be hereafter studied, but our first object is only the living witness, the witness actually present and ready to go upon the stand. It is the witness in open court, and his relations to and standing with regard to the court, jury and parties, that first demands our attention.

§ 2. **The oath.** The first pre-requisite exacted from every person who goes upon the stand in a legal investigation for the purpose of giving his testimony in that case in which he is called, is that he must first be sworn, as no evidence will be allowed to go to the court or jury unless it comes to them under the sanctity of an oath. The rule is universal, is of great antiquity and should be subject to no exceptions. In New York State an infant under twelve is permitted to give evidence without taking an oath, but other evidence must be forthcoming to ensure a conviction. Laws 1892 (N. Y.), chap. 279, § 7.

The definition of an oath has been variously given by

different jurists, one author holding that "an oath is an application of the religious sanction, calling the Deity to witness in aid of a declaration of man." Best on Ev. § 57. This definition hardly applies in its entirety at the present day, since the religious character has been so largely withdrawn from it; now witnesses are permitted to reject the Bible and refuse to take their oath upon it, and merely affirm. It has also been stated to be "a solemn invocation of the vengeance of the Deity upon the witness if he does not declare the whole truth so far as he knows it." 1 Starkie, Ev. 22. This last definition seems to express too strongly the meaning attached to the taking of an oath, and carries its significance to a much greater intent than the act admits of.

The best definition, and one most in harmony with the practice generally prevalent to-day in our courts, is that "an oath is an outward pledge or acknowledgment given by the person taking it, that his attestation or promise is made under an immediate sense of his responsibility to God." Bouv. p. 249. This seems to embrace all the material and usually received ideas of the meaning at present attaching to this ceremony, and covers equally with its terms the oath which is taken upon the gospels, or where an affirmation is used.

§ 3. **The mode of taking the oath.** Formerly the manner in which the oath was administered was determined by no fixed rule, but depended entirely upon the character of the individuals who were offered as witnesses, and was varied according to their respective nationalities, beliefs or tenets. The object being to impose upon the witness an obligation which would be felt by him to be binding, the manner in which he should take that oath was therefore made to conform to that

mode deemed most sacred by the religious sect to which the witness belonged. Thus, a Jew was sworn on the Pentateuch or Old Testament, with his head covered. *Strange* (Eng.), 821, 1113 ; a Mahomedan on the Koran ; 1 *Leach*, Cr. Cas. (Eng.), 54 ; a Gentoo, by touching the foot of a Brahmin or priest of his religion ; *Ormichund v. Barker*, Wills, Circum. Ev. (Eng.) 549 ; a Brahmin by taking the hand of a fellow Brahmin ; 1 *Car. & M.* (Eng.) 248 ; a Chinaman by breaking a china saucer ; *Whart.* Cr. Ev. § 854 ; a Scotch covenanter or member of the kirk by holding up the hand without kissing the book. In this country these peculiar modes are usually unpractised, and the ceremony is customarily performed by swearing upon the gospels, resting upon them the fingers, while the clerk of the court or some duly authorized person reads the form of the oath, at the conclusion of which the witness promises and kisses the book. Code Civ. Pro. §§ 845, 846, 847. The statutes of the various states regulate the way in which the witness shall be sworn, and in many of them it is left optional with the witness either to swear upon the gospels or to affirm. The courts, however, seem to possess the power, when they are satisfied that the witness deems some other mode of swearing more binding than laying his hands upon the gospels and kissing them, of requiring the witness to be sworn in that different manner. N. Y. Code Civ. Pro. § 848. Also, the court is permitted, when it occurs that the witness is a person who does not believe in the Christian religion, but in some other, to have him sworn according to the peculiar ceremonies, by which, according to his religion, he is under a solemn obligation to tell the truth, or in which the oath is usually administered. Code Civ. Pro. § 849. Also the court can ask a

witness what peculiar ceremonies in taking an oath he deems the most binding or obligatory upon him. Code Civ. Pro. § 850. It has been held, that where an oath was irregularly administered upon a book other than the holy evangelists, but the person taking it supposed it to be the Bible, it was a valid oath. *People v. Cook*, 8 N. Y. 67; aff. 14 Barb. 259.

§ 4. **Who are competent.** This section does not deal with the competency of witnesses as affected by section 829 of the Code of Civil Procedure, that branch of the subject being elsewhere discussed in the chapter devoted to a consideration of that section of the Code.

The presumption that a witness who has been sworn as such is fully and in every way competent to testify, always exists in his favor until overthrown by proof that the contrary is the fact. The law declares it to be the duty of the party who is aware of such incompetency to make his knowledge known at once, and not lie quietly by, being willing to allow such witness to testify, and take advantage of all testimony which tends to the injury of the adverse party or which is favorable to his own cause, and only raise his objections when it appears that the testimony is beginning to benefit his adversary. The party who pursues this course is not allowed to reap such advantages as might have accrued, had he made known the disqualifications of the witness at the proper time. *Hoyt v. Hoyt*, 112 N. Y. 493; *Levin v. Russel*, 42 N. Y. 251; *Cross v. Smith*, 85 Hun, 49; 32 Supp. 621. This rule does not of course apply in those cases where the disqualifications were not known, or the party was unaware of the real nature of the incompetency until after the examination had progressed, and had immediately upon becoming fully cognizant of the true state of

the case made his objections known. *State v. Dammeray*, 48 Me. 327 ; *Veiths v. Hagge*, 8 Iowa, 163 ; *Shurtleff v. Willard*, 19 Pick. (Mass.) 202 ; *Andre v. Brodman*, 13 Md. 241 ; *Howser v. Commonwealth*, 51 Penn. St. 332 ; *Rex v. Whitehead* (Eng.), 10 Cox, 234.

It has been held, however, that where the objection has been once properly made, it need not be repeated as a ground of objection to subsequent testimony by the same witness. *Carlson v. Winterson*, 147 N. Y. 652 ; 71 St. Rep. 263 ; aff. 10 Misc. 388 ; 31 Supp. 430 ; 64 St. Rep. 113 ; *Hobart v. Hobart*, 62 N. Y. 80 ; *Schoonmaker v. Wolford*, 20 Hun, 166.

There is a great difference between competency and credibility, and those defects which affect one have no bearing upon the other. Thus, while the testimony of a witness depends for credibility not only upon the character of the medium through which it comes, but upon the other, and generally more common, grounds of his complete understanding or knowledge of the subject upon which he testifies, the time and opportunity afforded to him of observing the facts concerning which he gives his evidence, the amount of attention he paid to the occurrences at the time, and the degree of remembrance of the facts which remains with him at the time he is testifying. On the other hand, these matters have no bearing upon the question of the competency of the witness, since that point does not depend upon such facts at all. As long as it appears that the witness is clothed in his right mind and the full possession of his developed mental faculties, and gives evidence of those things which he saw, he is competent to testify upon those points unless he is rendered incompetent by reason of some disqualifications of a personal nature. Upon the



question of competency, it is proper to observe that the legal rule which always requires the production of the best evidence the case is capable of affording must not be taken in a too literal sense. That is to say, the rule does not apply to the extent that the better of two men who are acquainted with the facts should be produced. That is because of two men who witnessed an occurrence, one is able to give much more information in regard thereto than the other, that fact does not prevent the witness who remembers or knows the least thereof from being perfectly competent, notwithstanding, in a strictly literal sense, his is not the best evidence. In the same way one who has heard admissions which a party has made is a competent witness in that respect, although both the person who made them and he to whom they were made are the best witnesses thereof and are not called.

§ 5. **Incompetency.** The determination of the question whether or not the witness is competent is a matter to be determined by the court alone, since it comes exclusively within its province.

The incompetency which might affect a witness may be divided or distinguished as, first, an apparent incompetency; as in those cases where the person taking the stand is seen to be of too tender years, or is visibly in a condition of inebriety or is evidently mentally incapacitated to give testimony; second, a latent incompetency. The latter form of incompetency refers to all cases, where the defect can only be proved by evidence of some nature, and the question only arises in legal proceedings, upon some objection to the witness being interposed, which is based upon this ground. This is also to be determined by the trial court, after a preliminary examina-

tion by it of the person excepted to, which is called an examination on his *voir dire*, and upon which the court must make careful inquiry into the grounds of the objections which are raised.

There are at present, as a rule, but two recognized causes which render a witness incompetent at all times and under all circumstances, and these are, first, the mental unsoundness of the witness at the time he is called upon to give his testimony, and the other is the lack of a sufficient degree of requisite understanding by reason of extreme youth. There are other grounds of incompetency, which are treated of hereafter, but they are not *per se* such defects as exclude absolutely, but only exert such force under certain circumstances, while, by reason of a different condition of facts, the same persons may be perfectly competent. The incompetency relating to the former class may be termed personal, while that applied to the latter might be called conditional.

§ 6. **Idiots and lunatics.** In regard to that unfortunate class of persons who were born with weak or totally deranged mental faculties, as well as those whose minds, once strong and healthy, have become disordered to a disqualifying degree, all evidence by them while the cloud rests upon them is excluded, and they are declared to be incompetent as witnesses while in that condition. There is, however, a distinction to be observed in regard to the mental state of an idiot and that of a lunatic: the former is supposed to seldom, if ever, have a lucid interval, but the brain being originally unsound is presumed to always continue so, and therefore the rule seems to be, that an idiot is never competent as a witness, since the mind is considered to be too feeble to safely allow the testimony

of such persons to go to the jury. *Coleman v. Com.*, 25 Gratt. (Va.) 865.

Care must be taken, however, not to exclude every one who may possess but a weak understanding. That the intellect is weak is not alone a ground for the rejection of the evidence, since, unless the degree of feebleness be of such an extent as to rob the mind of all intelligence, it does not ordinarily totally incapacitate.

Thus when an inmate of a poorhouse, a woman of weak intellect, was ravished, and it was desired to have her testimony upon the trial, the court permitted it to be given, through the interpretation of the keeper, upon his showing that she had always been able to communicate to him, by means of signs, her desires ; that she by such signs could carry on an intelligent conversation with him and could observe and understand occurrences about her. *People v. Mc Gee*, 1 Den. 19.

Insane persons, on the other hand, may not be at all times deprived of the power of reasoning, for it is not an uncommon occurrence for them to have lucid intervals, during which time the mania withdraws from them for a season and leaves the mind in such a condition of freedom from disease that the witness may be competent to testify concerning such events as fell within his observation and which occurred while he enjoyed such lucid state. It has been held, however, that before such testimony can be received it must be made to satisfactorily appear to the court that the mental condition of the witness is, for the time being, in such a state, that he may be termed temporarily sane, otherwise the presumption exists against such competency. *Holcomb v. Holcomb*, 28 Conn. 177.

The fact, however, being that he had been insane,

and from the peculiar nature of the disease it being well known that the liability of again relapsing into his former state is ever present, and does, in the majority of instances, eventually result, must necessarily operate to some degree upon the question of the trustworthy character of the testimony he may give. In other words, while the fact that he is subject to fits of mental derangement does not render him incompetent (*Campbell v. State*, 23 Ala. 44), the circumstance that his mind has been disordered, and in all probability will again become so, proves that such a peculiar condition of his intellect exists as to generally operate to impair, to some extent, his credibility. This consideration must be of more moment in some cases than others, and indeed there are cases where it can be said to almost wholly cease to be potent. In all cases, however, the amount of credibility which the testimony of such a witness is entitled to is a question entirely for the jury to determine. *Livingston v. Kiersted*, 10 Johns. 362; *Holcomb v. Holcomb*, 28 Conn. 177.

There is a species of insanity termed monomania, and the class of persons who are afflicted by this form of derangement are designated as monomaniacs, or persons whose intellects are disordered upon one particular point, or concerning some single subject. The question has arisen, whether such persons are competent to testify upon a trial, where the matters at issue are not in any manner connected with that particular subject upon which it may be said that they are insane. Of course upon any proceedings relating in the remotest degree to that which is the object of their mania, there could be no doubt concerning their inca-

capacity, but in regard to the former, it has been argued for admission, and in some cases such testimony has been admitted, upon the ground that their minds being clear upon all other points, they are competent, since the mere fact of incompetency in regard to a matter which is in no wise under discussion should not affect their eligibility as witnesses. This view of the case seems to be generally accepted, and the evidence of witnesses of this description permitted to go to the jury. *Com. v. Reynolds*, cited in 10 Allen (Mass.), 64; *Kendall v. May*, 10 Id. 59; *Holcomb v. Holcomb*, 28 Conn. 181; *Campbell v. State*, 23 Ala. 44; *Coleman v. Com.*, 25 Gratt. (Va.) 865; *Rex v. Hill* (Eng.), 5 Cox, C. C. 259.

While, therefore, the courts do not deem it just to reject the testimony of a monomaniac, yet his evidence should be most carefully considered, for the fact cannot be ignored, that the very moment the witness is engaged in giving his testimony his mind is in reality unhinged, is not sound, and he cannot in truth be deemed a sane man. Now, it does not seem to make any material difference upon the subject, whether the mind is diseased upon only one point or upon several; the true test of credibility is, is the mind deranged at all, or is it in a healthy condition? If the faculties of the brain are disordered at the time, whether it be upon one subject or upon many, the testimony cannot be said to come from a man possessing a sound intellect, or to be the expressions of a well-balanced mind.

Upon this point it has been well stated by the court before whom such testimony had been adduced that: "The inlets to the understanding may be perfect so far as any human eye can discern; the moral qualities may

be all healthy and active ; the conscience may be sensitive and vigilant, and the memory may be able to perform its office faithfully, and yet, under the influence of morbid delusions, reason becomes dethroned, false impressions from surrounding objects are received, and the mind becomes an unsafe depository of facts. The force of all human testimony depends as much upon the ability of the witness to observe the facts correctly, as upon his disposition to describe them honestly ; and if the mind of the witness is in such a condition that it cannot accurately observe passing events, and if erroneous impressions are thereby made upon the tablet of the memory, his story will make but a feeble impression upon the hearer, though it be told with the greatest apparent sincerity." *Holcomb v. Holcomb*, 28 Conn. 181.

Upon a trial, it was sought to use a person as a witness who had at one time been confined in an insane asylum, and who at the time of the trial was shown to be a monomaniac, believing that he was possessed of twenty million spirits.

The testimony given by the medical witnesses went to establish the fact that, notwithstanding this delusion, he was perfectly capable of giving an accurate account of such transactions as occurred in his presence and under his observation. It also appeared that he understood the nature of an oath, and believed in a future state, where a man was rewarded or punished for the acts done by him in this life. The trial court allowed the witness to give his evidence, and that ruling was sustained by the higher court. *Rex v. Hill* (Eng.), 5 Cox, C. C. 259.

Where such witnesses are permitted to testify, however, the adverse party has always the right to show

that the witness has been insane, or is subject to insane delusions, for the purpose of impeaching his credibility. *Livingston v. Kiersted*, 10 Johns. 362 ; *State v. Kelly*, 57 N. H. 549 ; *Campbell v. State*, 23 Ala. 44.

The fact that an inquisition of lunacy formerly pronounced the witness to be insane is a material fact upon the question of competency, and creates *prima facie* a presumption against him, which must be overthrown by some evidence showing his present capacity, or the court will reject him. *Hoyt v. Ade*e, 3 Lans. 173 ; *Van Deusen v. Sweet*, 51 N. Y. 378. Yet if it be made to appear that at the time of testifying he is sufficiently sane to understand the nature of the oath he takes, and is conversant with those facts of which he is about to speak, he will be held competent. *Kendall v. May*, 10 Allen, 63. It is also permitted, where at the time of trial the witness appears to be enjoying a lucid period, and to be rational in his mind, to produce evidence to the effect that at the particular time at issue the witness had exhibited signs denoting mental distress, in order to affect his credibility. *State v. Kelly*, 57 N. H. 549 ; *Fairchild v. Bascomb*, 35 Vt. 398 ; *Holcomb v. Holcomb*, 28 Conn. 177.

§ 7. **Infancy.** The other absolutely essential requisite which the witness must possess in order to be allowed to testify is that he should have sufficient intellect, or religious training, to understand the nature and meaning of an oath. It is too plain to require argument, that, although a witness may possess every qualification of competency, yet if he does not comprehend the nature of the act of taking an oath, and the obligations and responsibilities which it carries with it, such lack of knowledge must necessarily put the stamp of incompetency upon

him. The most frequent instance in which this question arises, and those in which a just determination of the matter is surrounded oftentimes with the greatest difficulty, is in the case of children called as witnesses, where the objection to their testifying is based upon the ground that they are too young to understand the transactions about which they are called to give their evidence, and also, on account of their extreme youth, are unable to appreciate the obligations they take upon themselves with the oath, or the penalties which swearing falsely entails.

It is not possible to lay down any rule as to the age at which an infant can or cannot be presumed to be competent. Generally speaking, an infant over fourteen is supposed to possess the necessary degree of competency, but the vast difference which exists in the mental development among children of the same age, or of different ages, renders the adoption of a rule in this respect impossible. *State v. Ritchie*, 28 La. Ann. 327; *Brown v. State*, 2 Tex. App. 115; *Draper v. Draper*, 68 Ill. 17; *Flannagan v. State*, 25 Ark. 92; 1 Barb. Cr. Law, p. 891; 1 Greenleaf, § 367; Roscoe, Cr. Ev. 8th Ed. § 175; *State v. Dougherty*, 2 Tenn. 80; *Commonwealth v. Hutchinson*, 19 Mass. 225.

Under the age of fourteen years, however, the inference is the other way, and the competency of the child should first be shown upon examination by the court before it should be allowed to assume the functions of a witness. *People v. McNair*, 21 Wend. 608; *Carter v. State*, 63 Ala. 52; *State v. Dougherty*, 2 Tenn. 80; *Com. v. Hutchinson*, 19 Mass. 225.

Where the court is called upon to decide this question, it finds itself confronted by two problems at the outset.



First, not to allow an injustice, by permitting one too immature to be safely depended upon to give accurate testimony, and second, not to permit a cause to fail by a too hasty or technical decision as to its incapacity.

The true test by which the competency of a child is determined is as follows: The child must be shown to possess, not only sufficient mental ability to understand the nature of an oath, but it must also appear that it has had such an amount of a religious and other instruction upon that point, that it does so understand the act it performs, and in addition that the witness is able to relate accurately all those occurrences which it saw and which are the matters it proposes to give its testimony concerning. *Jackson v. Gridley*, 18 Johns. (N. Y.) 98; *Commonwealth v. Hill*, 14 Mass. 207; *State v. De Wolfe*, 8 Conn. 98; *State v. Whittier*, 21 Me. 341; *Commonwealth v. Hutchinson*, 10 Mass. 225; *Draper v. Draper*, 68 Ill. 17; *Commonwealth v. Carey*, 2 Brewst. (Pa.) 404; *McGuire v. People*, 44 Mich. 286; *Washburn v. People*, 10 Id. 372; *State v. Levy*, 23 Minn. 104; *Blackwell v. State*, 11 Ind. 196; *State v. Jackson*, 9 Oregon, 457; *Johnson v. State*, 60 Ga. 35; *Carter v. State*, 63 Ala. 52; *Peterson v. State*, 47 Ga. 524; *Speers v. Snell*, 74 N. C. 210; *State v. Edwards*, 79 Id. 648; *State v. Moren*, 2 Ala. 275; *Wade v. State*, 50 Id. 164; *State v. Denis*, 19 La. Ann. 119; *State v. Richie*, 28 Id. 327; *Vincent v. State*, 3 Heisk. (Tenn.) 414; *State v. Scanlon*, 58 Mo. 204; *State v. Doherty*, 2 Tenn. 80; *Brennon v. State*, Id. 191; *Hill v. State*, 5 Lea (Tenn.), 725; *Coon v. People*, 99 Ill. 368; *Flannagan v. State*, 25 Ark. 92; *Warner v. State*, Id. 447; *Davidson v. State*, 39 Tex. 129; *Brown v. State*, 6 Tex. App. 287; *Rex v. Powell* (Eng.), 1 Leach, 110; *Rex v. Brazier*, Id. 199. If the preliminary examination does not reveal

such conditions as existing, the witness must be rejected, but if they are present the child is a competent witness.

Thus where an objection was raised to the competency of the child, she was examined as follows : " Is it a good or bad thing to tell a lie ? " She answered, " A bad thing. " " Do you say your prayers ? " " Yes. " " What becomes of a person who tells lies ? " " If he tells lies he goes to the wicked fire. " The court held the child competent. *Reg. v. Holmes* (Eng.), 2 F. & F. 788. Also a child six and a half years old, who knew that she would be punished if she told an untruth, was allowed to testify. *Agnew v. Brooklyn, etc., Co.*, 5 Supp. 756 ; 20 Abb. N. C. 235 ; 13 Civ. Pro. 25 ; 117 N. Y. 651.

Where a boy eleven years of age testified that he believed in heaven, the home of God, and hell, the home of the devil ; that at death the good will go to the former and the bad to the latter ; that it was bad to lie, both in and out of court ; that for the former he would be sent to prison, and for the latter his parents would whip him, he was held competent. *Jones v. Brooklyn, etc., Co.*, 21 St. Rep. 169 ; 3 Supp. 253.

It has also been held that a child of nine years of age, who is ignorant of the nature of an oath, or the obligation of a witness, and had never been sworn, is incompetent, and it is not error for the court to refuse to instruct him as to the nature and obligation of an oath. *Jones v. People*, 6 Park, 126.

A child of ten years of age, who says that he understands that to tell a lie under oath is wrong, and that he may be punished for it, is a competent witness. *People v. Linzey*, 79 Hun, 23 ; 61 St. Rep. 240 ; 29 Supp. 560.

But it has been held that the court may refuse

to receive the testimony of a child seven years of age. *People v. Smith*, 86 Hun, 485 ; 33 Supp. 989 ; 67 St. Rep. 670.

But a boy of ten, if he understands the nature of an oath, is competent. *Moore v. State*, 79 Ga. 498.

A child who understands he is brought into court to tell the truth, and it is wrong to tell a lie, has sufficient understanding of an oath to be competent. *State v. Levy*, 23 Minn. 104. Also so held, where a child said she would go to the bad world if she told a lie. *Vincent v. State*, 3 Heisk. 120. Also, where a child said the bad man would get her. *Logston v. State*, 3 Id. 414.

But where a child said she did not know what the gentleman meant when he held up his hands, she was held to be incompetent in the absence of any subsequent information. *Holst v. State*, 23 Tex. App. 1.

Also, where upon a trial for murder a child was produced as a witness, and upon objection being raised, it was shown that at the time of the commission of the crime, concerning which she was to give her testimony, she was utterly ignorant of religion, and was utterly without any knowledge of the existence of a future state, and knew nothing whatever concerning the nature or obligations of an oath. It appeared that since the occurrence she had been visited twice by a clergyman, who, while he had been able to instruct her somewhat in regard to the meaning and character of the oath which she was to take, had not been successful in his efforts to instil into her any ideas of a religious nature, so that in regard to ignorance of religious matters her condition at the trial was unchanged from her former state. The court rejected her as a witness. 3 Russ. on Cr. 9th Ed. 612.

Also, where it was sought to use the dying declarations of a child of four years old, it was held incompetent. *Pike's Case* (Eng.), 3 C. & P. 598.

On the other hand, children under seven years of age have been held competent, the credibility of their testimony being left to the jury. *Com. v. Hutchinson*, 10 Mass. 225; *State v. Mora*, 2 Ala. 275; *Washburn v. People*, 10 Mich. 372; *State v. Le Blanc*, Mill (S. C.), 354; *Givens v. Com.*, 29 Gratt. (Va.) 835; *Flannagan v. State*, 25 Ark. 92; *Com. v. Carey*, 2 Brewst. 404; *Warner v. State*, Id. 447. There is also one case where a child of the age of five years was allowed to testify upon a trial. *Rex v. Brazier* (Eng.), 1 Leach, 199.

Yet, on the other hand, a conviction principally due to the testimony of two girls, aged respectively nine and eight, was set aside on the ground of their incompetency. *Coon v. People*, 99 Ill. 368.

§ 8. **Question of competency is for the court.** As has been already stated, this question as to the capacity of the child to testify does not depend entirely upon the child's age, but it is only a fact for consideration, which must be taken in conjunction with all the other facts which may be developed upon a preliminary examination, and upon which the court shall pass. This matter must be determined by the court, or officer, who may examine an infant, or a person of apparently weak intellect, produced before it, or him, as a witness, to ascertain his capacity and the extent of his knowledge. Code Civ. Pro. § 850. The decision of the court must not be influenced by the child's age, but based entirely upon the fact, whether the result shows that the witness has the degree of intelligence which the law demands must be possessed by all witnesses who testify in a court of

justice. *Commonwealth v. Hutchinson*, 10 Mass. 225 ; *State v. Whittier*, 21 Me. 341 ; *Commonwealth v. Mullins*, 2 Allen, 295 ; *State v. Lattin*, 29 Conn. 389 ; *Stinson v. State*, 31 Ind. 90 ; *State v. Edwards*, 79 N. C. 648 ; *Peterson v. State*, 47 Ga. 524 ; *Rex v. Perkins*, 2 Wood (Eng.), C. C. 135.

It sometimes occurs that a searching examination reveals that the apparent lack of knowledge displayed by the child's answers in regard to the nature of an oath arise either from fright or simply from neglect of giving of the proper instruction in regard to that act, and not from any incompetency in the understanding or lack of religious training. In those cases a short suspension of the proceedings, in order that the court may instruct the witness in respect to the act, to allow time for the child to recover from its agitation, has been sometimes allowed. *State v. Scanlon*, 58 Me. 206 ; *Rex v. White*, 1 Leach (Eng.), 430 ; 1 Greenleaf, Ev. 14th Ed. § 367 ; 3 Russ. Cr. 9th Ed. 613.

This, however, is a matter discretionary with the court. Thus upon a trial, where a child of nine years of age was called as a witness, and upon his preliminary examination stated that he did not know the nature of an oath, or the obligation resting upon a witness to tell the truth, the trial court was held to have properly excluded him from the witness stand, and that it committed no error in refusing to instruct the child as to the nature of an oath or as to such obligations. *Jones v. People*, 6 Park, 126.

Where, however, the court decides to give such instructions, such instructions cannot be given in private, but, on the contrary, must take place in public in the presence of both parties or their counsel. The adverse

party must have the right afforded him of hearing and knowing just what is said to the child, and from its answers and responses to be able to acquire a knowledge of the exact state of the mind possessed by the witness. *Simons v. State*, 31 Ind. 90. But this examination or giving of instruction must proceed without any interference of counsel, unless allowed by the court, and the court may explain such matters to the witness. *State v. Ritchie*, 28 La. Ann. 327. It must be a very flagrant case of error which will authorize an appellate court to reverse a decision of a court that a witness is incompetent. *Peterson v. State*, 47 Ga. 524.

§ 9. **Defect in religious belief.** It was formerly well-nigh universally held by the courts that a witness could not be considered competent unless he had a religious belief of some kind, or of such a nature as to impress upon him the conviction that a violation of the oath which he was about to take would entail upon him future punishment at the hands of a Supreme Being, who ruled the universe. It does not seem to be longer required, even in those states where this qualification is still considered necessary, that the witness should belong to what is designated as the Christian faith, but, on the contrary, it is no objection to him that he does not so belong, since it is permitted to him to have any belief, belong to any sect, or indulge in any particular form of religious worship, as long as the fact is that he believes in a Supreme Being, who has both the will and the power to punish the perjurer. *Butts v. Swartwood*, 2 Cowen, 431; *Blair v. Seaver*, 26 Pa. St. 274; *Brick v. Mulligan*, 10 Ohio, 121; *Newton v. Ladd*, 4 N. H. 444; *Cent. Mil. R. R. Co. v. Rockafellow*, 17 Ill. 541; *Anderson v. Maberry*, 2 Heisk. (Tenn.) 653; Missouri Rev. Stat.

1835, p. 419 ; *Scott v. Hooper*, 13 Vt. 535 ; *State v. Petty* (S. C.), 1 Hooper, 62.

Where a religious belief is required, the true test is said to be, that while it is not deemed necessary that the witness should be of the orthodox faith, yet he must believe in a future state of punishment, although it is not required in addition thereto that he should believe such a state of punishment will last forever or be eternal. *Blackus v. Burness*, 2 Ala. 354 ; *U. S. v. Kennedy*, 3 McLean, 175. It has also been decided that a disbelief in the doctrine of future awards or punishments for deeds committed in this life are not to be considered in determining this question, provided the witness does believe in the Supreme Being. *Smith v. Coffin*, 6 Shep. (Me.) 157 ; *Jones v. Harris*, 1 Strob. (S. C.) 160 ; Conn. Rev. Stat. 1849, tit. 1, § 140 ; N. H. Rev. Stat. 1842, c. 188, § 9.

But in those states retaining the common-law rule in respect to a religious belief, it is held that a person who possesses no belief in God and a future state of existence, where good deeds will be rewarded and the wicked punished, but, on the contrary, belongs to that class of persons classed as atheists, is not capable of being a witness in a court of justice, and cannot be competent to give testimony upon any trial. 1 Greenleaf, Ev. 14th Ed. § 368 ; Whart. Cr. Ev. § 361 ; Roscoe's Cr. Ev. 8th Ed. § 180 ; 3 Russell, Cr. 9th Ed. 613 ; *Wakefield v. Ross*, 5 Mason, 16 ; *Curtiss v. Stern*, 4 Orys. C. Rep. 51 ; *State v. Cooper*, 2 Tenn. 96 ; *Sherlock v. Whitney*, 2 Cush. 104.

The rule as held in those jurisdictions is thus expressed : "The law is wise in requiring the highest attainable sanction for the truth of testimony given, and is consistent in rejecting all witnesses incapable of feeling this

sanction, of receiving this test; whether this incapacity arises from the imbecility of their understanding, or from its perversity. It does not impute guilt or blame to either. If the witness is evidently intoxicated, he is not allowed to be sworn, because for the time being he is evidently incapable of feeling the force and obligation of an oath. The *non compos* and the infant of tender age are rejected for the same reason, but without blame. The atheist is also rejected, because he, too, is incapable of realizing the obligations of an oath, in consequence of his unbelief. The law looks only to the fact of incapacity, not the cause, or the manner of avowal. Whether it be calmly insinuated with the elegance of Gibbon or roared forth in the disgusting blasphemies of Paine, still it is atheism, and to require the mere formality of an oath, from one who avowedly despises or is incapable of feeling its peculiar sanction, would be a mockery of justice.” 1 Greenl. Ev. 4th Ed. § 368, *n*.

The rule requiring the witness to possess a religious belief in order to be competent is not, however, by any means universal, and in many of our states this is not considered a necessary qualification, and a witness is competent without any regard to his opinions in all matters pertaining to religion. Laws Arizona 1879, p. 469; Const. N. Y. State, art. 1, § 3; Tex. Rev. Stat. art. 2249; Tex. Cr. Code, art. 736; Code of California (Hittell's), § 11879; Ind. Rev. Stat. 1881, § 505; Minnesota Stat. 1878, p. 792; Miss. Rev. Code 1880, § 1604; Vermont Rev. Stat. 1880, § 1007; *Hunscomb v. Hunscomb*, 15 Mass. Rep. 184; *Perry's Case*, 3 Gratt. (Va.) 632; *Com. v. Kaufman*, 1 Circuit Ct. Rep. (Pa.) 410. The lack of religious belief does, however, greatly affect the credibility of the witness, and where such a fact is shown it materially damages



his testimony. *Stanbro v. Hopkins*, 28 Barb. 265 ; *Hunscomb v. Hunscomb*, 15 Mass. 184. One who believes in nothing is generally believed by none. It is therefore of importance to prove this state of unbelief of the witness, in order that such fact may have its proper effect upon the jury ; and where such a state of mind exists, then such fact becomes vitally important.

§ 10. **Unbelief, how proved.** In the first place it must be remembered that the presumption always exists, that he who offers himself as a witness possesses all the necessary qualifications, and he who asserts the contrary has resting upon him the burden of proving it. *Donnelly v. State*, 26 N. J. L. 463. Also, religious belief once shown to have existed is presumed to continue until the contrary is shown. *State v. Stinson*, 17 Me. 154.

It seems to be the rule in England to examine the witness himself as to the fact of his religious belief either before he has been sworn or upon his *voir dire*. *Rex v. Taylor*, Peake, 11 ; *Queen's Case*, 2 B. & B. 284 ; *Rex v. White*, Leach, 430 ; *Moden v. Catenach*, 31 L. J. Exch. 118 ; 7 Hulst. & N. 360 ; Roscoe's Cr. Ev. 182 ; 3 Russ. Cr. 617. But that does not appear to be the practice in this country, and in the United States an examination of the witness upon this point does not seem to receive the sanction of the courts. This opposition is grounded upon sound reasoning, for to require the witness to be sworn to answer truly such questions as may be put to him, touching his likelihood to commit perjury upon the trial, would smack strongly of the absurd.

Upon this question Chief Justice Stone states the rule to be : "The want of such religious belief must be established by other means than the examination of the witness upon the stand. He is not to be questioned as to

his religious belief, nor required to divulge his opinion upon that subject, in answer to questions put to him while under examination. If he is to be set aside for want of such religious belief, the fact is to be shown by other witnesses, and by evidence of his previously expressed opinions voluntarily made known to others." *Com. v. Smith*, 2 Gray (Mass.), 516. To same effect, *Jackson v. Gridley*, 18 Johns. (N. Y.) 98; 1 Greenleaf, 14th Ed. § 370; *Smith v. Coffin*, 6 Shepl. 157; *Odell v. Kopper*, 5 Heisk. (Tenn.) 88. Thus his declarations formerly made as to his non-belief in the existence of a God can be given in evidence. *Anderson v. Newberry*, 2 Heisk. (Tenn.) 653; *Barthelemy v. People*, 2 Hill, 248; *Halley v. Webster*, 21 Me. 461. It is also proper for the party to give testimony in rebuttal, but he must show by other parties than himself that he has undergone a change of heart, and no longer entertains his former atheistical opinions, but now does in fact believe in God. *State v. Townsend*, 2 Harr. (Del.) 543; *Atwood v. Wilton*, 7 Conn. 66; *Curtis v. Strong*, 7 Day, 51; *State v. Hooper*, 14 Vt. 535; *Com. v. Bachelor*, 4 Am. Jur. 79, n.; *Tuttle v. Gridley*, 18 Johns. 981.

It would seem that these rules were meant to more especially apply to those cases where an absence of belief in the Deity excludes from the witness stand. Where such an effect is not produced by non-belief, it does not seem reasonable to suppose that the witness may not be interrogated on cross-examination in regard to his religious opinions, equally with any other matter which goes to affect his credibility.

It would also seem that a witness can, if he so desire, state just what his religious belief is, and show that, while differing from the orthodox forms, it is yet one in

which the existence of a Supreme Being is recognized and future punishment for perjury believed in.

§ 11. **Physical incapacity.** By this term is meant the existence of such bodily infirmity of the witness at the time of the occurrence as would, from its nature, have a tendency to impair the credibility of the testimony given in reference to the transaction, or from the strength of the ailment would render a witness wholly incompetent to testify. This physical disqualification must have existed, however, at the time of the commission of the crime, in order to render it available against the witness. That fact has no bearing upon the testimony, if the affliction did not befall the witness until after the act took place. Thus, a man who becomes deaf after the affair is perfectly competent to testify as to what he heard prior to his misfortune, and one upon whom blindness has fallen may yet testify to what he saw when he enjoyed sight.

But in regard to those who were born deaf and dumb, the rule seems to be that it devolves, in the first instance, upon the party calling them, to show that they possess capacity to be witnesses, before any presumption as to competency arises in their favor. 1 Greenleaf, Ev. 14th Ed. § 366.

Under the common law these unfortunates were unjustly placed in the same class with idiots, in regard to the almost conclusive adverse presumption of competency as witnesses ; but a more enlightened age recognizes the impropriety of the old classification, and now, unless otherwise incompetent, such persons may, upon sufficient understanding being shown, give their testimony by writing or by signs through the medium of an interpreter of the sign language of the dumb. *State v. De Wolf*,

8 Conn. 93 ; *Com. v. Hill*, 14 Mass. 207 ; *People v. McGee*, 1 Den. 19 ; *Snyder v. Natims*, 5 Blackf. 295 ; *Rushton's Case* (Eng.), 1 Leach, Cr. Cas. 408 ; *Reg. v. Megson* (Eng.), 9 Car. & P. 428 ; *Reg. v. Guthridge*, 9 Id. 471.

Thus, where a deaf and dumb man, who was born so, was a witness upon a criminal trial, the court allowed him to testify through the medium of his sister, who was sworn to act as an interpreter, upon it being shown that she and her brother had been able to converse together for many years by the use of certain well-defined signs and signals. It was also shown by her testimony that he was aware of the doctrines of Christianity, and she also promised to inform him of the religious and moral obligations of the oath he was about to take. *Rex v. Rushton* (Eng.), 1 Leach, 408.

Also, upon a trial for a rape committed upon a woman who was deaf and dumb, the complainant, having been previously instructed by teachers through signs concerning both the nature of an oath and of the obligation which rested upon a person taking it to tell the truth, was allowed to testify. 1 Rosc. Cr. Ev. 178.

As affecting the credibility, but not the competency of the witness, it is proper to show by evidence on his cross-examination, that he is defective in certain percipient powers, which in certain cases might greatly impair the value of his testimony.

As upon the strength or weakness of the memory depends entirely the value of the testimony given by the witness, it is always proper to show that the witness possesses a defective memory in order to impair the credibility of his evidence. *Ketchy v. State*, 70 N. C. 621 ; *Isler v. Dewey*, 75 Id. 46 ; *Flemming v. State*, 5 Humph. (Tenn.) 564 ; *Fairchild v. Bascomb*, 35 Vt. 398 ; *Living-*

*ston v. Kiersted*, 10 Johns. (N. Y.) 362 ; *Com. v. Cooper*, 5 Allen (Mass.), 495. Thus the imbecility arising from old age, since it destroys to a great degree the powers of the mind, goes to the credibility of the witness. *McCutcheon v. Pique*, 4 Heisk. (Tenn.) 563.

It does not appear to be proper upon this question to show that the witness was in the habit of indulging in drugs or narcotics which had a tendency to produce loss of memory, since the only fact to be considered is whether there is in truth a loss of memory, not whether there may be such a defect. *McDowell v. Preston*, 25 Ga. 528.

The incapacity arising from over-indulgence in liquor or drugs, of a person called as a witness, is a question for the court present, and may be decided from the personal inspection furnished by the witness himself. *Hacford v. Palmer*, 16 Johns. 143 ; *Fox v. Terr*, 5 W. C. Rep. 339.

§ 12. **Convict or infamous person.** At common law, a person who had been convicted of any crime which was of such a nature as to bring it within the definition of "infamous," became at once designated as an "infamous person," and forthwith ceased to be competent as a witness in legal proceedings. As the class of crimes to which this disqualification attached included pretty much the sum total of all felonies, it practically followed that under the common law every person convicted of a felony was debarred from the witness stand. Before the individual became stamped with this incompetency, however, something more than the mere verdict of conviction of a jury was required, but in addition to that act it was necessary that a judgment and sentence from a competent court should have followed the verdict of guilty. Therefore it was held that until such sentence

had been pronounced, notwithstanding the fact that a verdict of guilty might have been given, the defendant was competent to testify. 3 Russell, Cr. (Eng.) p. 625.

Under the old practice, therefore, it was neither the crime nor the guilt which disqualified, but the mere perfunctory act of passing sentence.

This anomaly seems to have relied upon no firmer foundation for its existence than the reason expressed by some jurists, that a verdict might be, or was liable to be, set aside. As this reasoning might equally apply to a sentence delivered upon an erroneous judgment, its force is not very apparent.

This old rule regarding convict testimony, with its subtle distinctions, is now generally done away with, and the fact of a former conviction no longer renders a witness incompetent in most of our states, but only goes to affect his credibility. Code, Civ. Pro. § 832 ; Conn. Gen. Stat. 1875, p. 440 ; N. Y. Penal Code, § 714 ; Mich. Laws 1861, c. 125, p. 118 ; Tenn. Stat. 1871, § 3812 ; Mass. Pub. Stat. c. 169 ; Iowa Code, § 3636 ; Hittell's Code (Cal.), § 11879 ; Colorado Gen. Laws 1877, c. 104 ; Delaware Laws 1874, p. 662 ; Ga. Code, § 3854 ; Ill. Rev. Stat. 1880, p. 505 ; Kansas Comp. Laws, § 3847 ; Minnesota Stat. 1878, p. 792 ; N. H. Gen. Laws 1878, c. 228 ; N. J. Rev. Stat. p. 378 ; Rhode Island Stat. 1882, c. 214 ; Vt. Rev. Stat. 1880, § 1008 ; Wis. Rev. Stat. 1878, § 4073.

But while the weight of the authorities is in the line of allowing convicts to become witnesses in legal proceedings, yet in many of the states an exception is made in this regard, where the former conviction has been for the crime of perjury. The crime of perjury is justly and properly considered as to so utterly stamp a man or

woman, as unworthy of belief, that the fact of a conviction therefor absolutely disqualifies such a person from ever becoming a witness in a court of justice. But this is not the rule in this state, where the provisions of our Civil and Penal Code are considered to make no exceptions as to any crime, and a witness convicted of perjury in the same or another action is not thereby rendered incompetent. *People v. O'Neil*, 14 St. Rep. 829 ; 109 N. Y. 266. The rule is said to be in this respect that the fact of such conviction "must be considered by the jury in connection with other evidence, under such prudential instructions as may be given by the court, and subject to the determination of the court having jurisdiction to grant new trials in cases of verdicts against evidence." *Dunn v. People*, 29 N. Y. 529.

From the use of the word "convicted" in the Codes without the word "sentenced," as used in the Revised Statutes, it was contended that the Codes did not mean to permit a sentenced person to be a competent witness. All ambiguity upon this point is, however, now done away with by our courts, which hold that the meaning of the term "convicted" also denotes the final judgment of the court in pronouncing sentence. *People v. McGloin*, 91 N. Y. 241 ; aff. 28 Hun, 150 ; *Lindeman v. N. Y. C. & C. R. R. Co.*, 46 Hun, 679 ; 11 St. Rep. 837 ; *Sacia v. Decker*, 1 Civ. Pro. 47.

*How proved.* The language of both the Codes is similar, as to the manner of proving such prior convictions of the witness : "The conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination, upon which he must answer any question relevant to that inquiry ; and the party cross-examining him is not con-

cluded by his answer to such a question." Code Civ. Pro. § 832 ; Penal Code, § 714.

The fact that the conviction took place in another state does not alter the conditions as to his competency. *Sims v. Sims*, 75 N. Y. 466 ; *Nat. Trust Co. v. Gleason*, 77 Id. 400. Nor does it prevent such former conviction being proved in the same manner as provided for in the Codes and introduced in evidence as to his credibility. *Sims v. Sims*, 75 N. Y. 466 ; *Com. v. Graham*, 99 Mass. 421 ; *State v. Ridgley*, 2 Har. & McHen. (Md.) 120 ; Florida Dig. 1881, p. 518 ; *Donohue v. People*, 66 N. J. 208 ; *Dickinson v. Duston*, 21 Mich. 561 ; *Brown v. State*, 18 Ohio St. 496 ; *Train v. State*, 40 Ga. 529 ; *Glenn v. Com.*, 42 Ind. 60 ; *State v. Watson*, 65 Me. 74 ; *Johnson v. State*, 48 Ga. 116.

These sections, however, refer only to criminal convictions, not civil actions. Thus held that a judgment in a civil action, against a party for a penalty for keeping house of ill-fame, is not a conviction of a crime or misdemeanor in the meaning of the act, and the record cannot be proved to affect his credibility in another action. *Arhart v. Stark*, 6 Misc. 579 ; 27 Supp. 301.

A witness examined in his own behalf can, however, be asked on cross-examination whether he has ever been convicted of selling liquor without a license. *Dowd v. Donnelly*, 35 St. Rep. 834. Also, if ever convicted of being drunk and disorderly. *People v. Burns*, 33 Hun, 296 ; 2 Cr. Rep. 415. Also, if ever convicted of petty larceny. *People v. Saterlee*, 5 Hun, 167. Also, if he had made an assault upon another. *People v. Irving*, 95 N. Y. 541 ; *People v. Casey*, 72 Id. 393.

The record of a conviction may also be put in evidence. *People ex rel. v. Paschal*, 68 Hun, 344 ; 22 Supp. 881.



If no objections are made to the mode of proof, all errors are considered as waived. *Perry v. People*, 86 N. Y. 353.

These provisions of the Codes, however, refer to convictions only, not to accusations or arrests which were not followed by convictions. A witness therefore cannot be asked how many times he has been arrested, nor if he has been arrested for a certain specified offense, since he is privileged from answering such questions. *People v. Brown*, 72 N. Y. 561; *People v. Crapo*, 76 N. Y. 288. Neither can he be asked if he was ever indicted. *Ryan v. People*, 79 N. Y. 593.

When the evidence of prior convictions is received, all questions of the credibility of the witness are for the jury. *People v. Chapleau*, 121 N. Y. 266.

## CHAPTER II.

### DISPARAGING AND CRIMINATING QUESTIONS.

- Sec. 13. Exemption from answering disparaging questions.  
14. Tending to disgrace.  
15. Illegal sale of thing in action.  
16. Bribery.  
17. Duelling.  
18. Gaming.  
19. Crimes against the public peace.  
20. Perjury.

§ 13. **Exemption from answering disparaging questions.** A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish the fact that he owes a debt, or is otherwise subject to a civil suit. But this provision does not require a witness to give an answer which will tend to accuse him of a crime or misdemeanor, or to expose him to a penalty or forfeiture ; nor does it vary any other rule, respecting the examination of a witness. Code Civ. Pro. § 837.

It is also declared by the Constitution of the United States that “ no man shall be compelled in any criminal case to be a witness against himself.” Const. U. S. Amend. V.

But this exemption from testifying and personal privilege, granted by the statute, does not apply where the statute of limitations has run against the party, and the witness in that event is not excused from testifying, nor relieved from producing documents tending to show him

guilty of a crime. *McCreery v. Ghormley*, 9 App. Div. 221.

This privilege is generally allowed in all the courts of this country, and no witness in any criminal proceedings will be compelled to answer questions which in the judgment of the court would tend to criminate him. *Id.*; *State v. Marshall*, 36 Mo. 400; *State v. Talbot*, 73 Id. 347; *Simmons v. Healster*, 13 Minn. 249; *Emory's Cases*, 107 Mass. 172; *Coburn v. Odell*, 30 N. H. 540; *Chamberlain v. Wilson*, 12 Vt. 491; *Phelim v. Kenderdine*, 20 Pa. St. 354, 362; *State v. Blake*, 25 Me. 350; *State v. Olin*, 23 Wis. 309; *People v. Mather*, 4 Wend. (N. Y.) 252. There are some decisions which seem to hold that this is a question for the witness himself to determine, and if he swears that the answers will have a tendency to criminate him, such is conclusive upon that point. *Warner v. Lucas*, 10 Ohio, 336; *Pool v. Perritt*, Speers (S. C.), 128. But the contrary has also been distinctly held, where the courts have decided that the determination as to the incriminatory character of the question rests with the trial court. *Floyd v. State*, 7 Tex. 215; *Richmond v. State*, 3 Green (Iowa), 532; *People v. Mather*, 4 Wend. 252. The drift of authority in the United States is toward vesting the court with the power to decide this question. The court should, however, be very solicitous to see that it makes no error in judgment in this regard, and that the witness is fully protected. Upon this point we have the words of Chief Justice Marshall: "It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to

convict of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be; and if he say on his oath that he cannot answer without accusing himself, he will not be compelled to answer. 1 Burns' Trial, 245. It must be borne in mind that this privilege can only be claimed where the answer would tend to the instituting of criminal proceedings against the witness. The fact that the answers might result in a civil suit, expose the witness to pecuniary loss or charge him with debt, has no bearing upon the question, and will not excuse the witness from answering. *Matter of Kip*, 1 Paige, 601; *Steward v. Turner*, 3 Edw. Ch. 458; *Taylor v. Jennings*, 7 Robb. 581; *Bull v. Loveland*, 10 Pick. (Mass.) 9; *Ward v. Sharp*, 15 Vt. 115; *Copp v. Upham*, 3 N. H. 159; *Cox v. Hill*, 3 Ohio, 411.

This privilege is entirely personal to the witness, and not available to the public prosecutor or any one else, and therefore neither his lawyer nor others can object to the witness answering incriminating questions. *Southard v. Rexford*, 6 Cow. 254; *Taylor v. Wood*, 2 Edw. Ch. 94; *Cloyes v. Thayer*, 3 Hill, 564. But where the party himself is a witness, his counsel may claim the privilege for him by objecting. *People v. Brown*, 72 N. Y. 571. It is for the witness to claim this privilege, although it has been held that a witness who has voluntarily given testimony as to part of those facts which would tend to criminate him cannot claim this privilege upon cross-examination. *Com. v. Pratt*, 126 Mass.; *Com. v. Price*, 10 Gray (Mass.), 472; but see *Mayo v. Mayo*, 119 Mass. 290; *Worthington v. Scribner*, 109 Id. 487; yet the weight of authorities gives him the right to claim the privilege at any stage of the case, irrespective of the fact whether

he had partly answered the question or not. *Neal v. Comingham*, 1 Cranch. C. Ct. 76; *Boyle v. Wiseman*, 29 Eng. L. & Eq. 473; *Rex v. Garbett* (Eng.), 2 C. & K. 75; see also *Chamberlain v. Wilson*, 12 Vt. 491; *State v. Fisher*, 23 N. H. 348.

The witness, however, may waive this privilege, and if, after being advised of his privilege, he chooses to disclose any part of a conversation or transaction, he is deemed to have waived his privilege, and must answer all questions relating to the transaction. *State v. K—*, 4 N. H. 562; *Youngs v. Youngs*, 5 Redf. (N. Y.) 505; *People v. Freshom*, 55 Cal. 375; *Chamberlain v. Wilson*. 12 Vt. 491; *Brown v. Brown*, 9 Mass. 320; *Foster v. Pierce*, 11 Cush. 431; *Norfolk v. Gaylord*, 28 Conn. 309; *State v. Nichols*, 29 Minn. 357; *Pinkard v. State*, 30 Ga. 757. Where, however, the witness has through inadvertence answered the question, or where the matter he has disclosed bears no relation to that which he claims would tend to criminate him, the privilege will be accorded to him. *Mayo v. Mayo*, 119 Mass. 290; *Coburn v. Odell*, 10 Fost. (N. H.) 590; *Dixon v. Vale* (Eng.), 1 C. & P. 278. Also, where a witness states a fact, it has been held that he must give his reasons for the statement, even though by so doing he criminales himself. *Hortenaie v. Kaufman*, 97 Penn. St. 147; *Com. v. Price*, 10 Gray (Mass.), 472; *State v. Blake*, 25 Me. 350. Also held that a witness claiming this right should not, by so doing, be discredited with the jury. *Milman v. Tucker* (Eng.), Peake's App. Cas. 222; *Rose v. Bakeman* (Eng.), 1 Ry. & M. 384; *Contra, Andrews v. Trye*, 104 Mass. 234. Also, that the opposing counsel should not be allowed to comment upon that fact in addressing the jury or court. *People v. Mannansaw* (Mich.),

20 N. W. Rep. 197; *Phelin v. Kenderdine*, 20 Pa. St. 354.

*Illustrations of the rule.* It has been held that the privileges of the statute extend to a bank officer who has, on his own account, illegally discounted a note. *Henry v. Bank*, 1 N. Y. 83. Also to one who was acting for the bank. *Curtis v. Knox*, 2 Dem. 341. Also to a lender of money, in an action upon a promissory note where the defense was usury. *Fellows v. Wilson*, 31 Barb. 162; *Livingstone v. Harris*, 3 Paige, 528; aff'd 11 Wend. 329. Also to books and papers. *Byass v. Sullivan*, 21 How. 50.

But it has been held that the language, "tends to expose himself to a penalty or forfeiture," cannot be invoked to justify a contestant of a will, in refusing to furnish testimony which would establish its validity. *Hoyt v. Jackson*, 3 Dem. 388. Also held, it does not apply to trade secrets. *Burncet v. Phalon*, 11 Abb. 157.

Neither does it apply in an action against a trustee to charge him with a corporate debt by reason of his failure to file an annual report. *Gadsden v. Woodward*, 38 Hun, 548; *Geisenheimer v. Dodge*, 1 How. (N. S.) 264.

Also held, that a trustee of a social club or society, liable for certain of its debts contracted while they were in office, by an act of the legislature, does not come under the head of liability for a penalty, and thus cannot claim this privilege, and thus serve an unverified answer to a verified complaint. *Rogers v. Decker*, 131 N. Y. 490.

Another point upon which there seems to be a difference of opinion is in regard to questions, the answers to which will not subject the witness to liability from any criminal proceedings, but will tend to degrade or disgrace him.

Our Codes are silent as to any exemption on this

ground. It has been held that if the evidence does not bear directly upon the issue, the witness is privileged from answering on the score of privilege. *Lohman v. People*, 1 N. Y. 379.

The contrary is held in more recent decisions, however, and it is decided that the admission or rejection of such evidence in cross-examination rests within the discretion of the court. *Great W. T. Co v. Loomis*, 32 N. Y. 127; *People ex rel. Phelps v. Oyer & Terminer*, 83 N. Y. 436.

*Who judges of the effect.* Much discussion has arisen as to the power of the witness himself to judge of the effect the desired evidence may produce upon his liability.

The rule has been laid down as follows: "Upon a review of the authorities, we are clearly of the opinion that to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer." *Youngs v. Youngs*, 5 Redf. 505.

But the witness claiming this privilege, on the ground it would tend to criminate him, should not be compelled to give his reasons, or the facts from which he fears a criminal prosecution might follow, since to force him to do so would expose him to the very proceeding he feared. *Id.*; *Close v. Olney*, 1 Den. 319; *State v. Marshall*, 36 Mo. 400; *People v. Perritt*, 1 Spears (S. C.), 128; *Lee v. Henderson*, 1 Cold. (Tenn.) 146; *Chamberlain v. Wilson*, 12 Vt. 491; *Pleasant v. State*, 15 Ark. 624; *Short v. State*, 4 Harr. (Del.) 568; *Higden v. Heard*, 14 Ga. 256; *Richmond v. State*, 2 Green (Iowa), 532; *Coburn v. Odell*, 10 Fost. (N. H.) 540; *Jauvin v. Scammond*, 9 Ind. 80; *U. S.*

v. *Moses*, 1. Cr. C. Ct. 170 ; *Fries v. Burgen*, 7 Halst. (N. J.) 79 ; *Fisher v. Reynolds*, English Law & Eq. 417.

It is so important that this privilege should not be denied to a witness, that it has been held that nothing but absolute immunity from prosecution can take its place. *People ex rel. Taylor v. Forbes*, 143 N. Y. 219 ; 62 St. Rep. 175.

It has also been held that it is the duty of the court to instruct a witness who declines to testify. *Close v. Olney*, 1 Den. 319 ; *Southard v. Rexford*, 6 Cow. 254 ; *Taylor v. Wood*, 2 Edw. 94.

Where it appears that the offense is barred by the statute of limitations, the court is barred to pronounce against claim to exceptions. *Close v. Olney*, 1 Den. 319 ; *Wolfe v. Goulard*, 15 Abb. 336.

§ 14. **Tending to disgrace.** Another point upon which there seems to be a difference of opinion is in regard to questions the answers to which will not subject the witness to liability from any criminal proceedings, but will tend to degrade or disgrace him.

§ 15. **Illegal sale of thing in action.** "No person shall be excused from testifying, in any civil action or legal proceeding, to any facts showing that a thing in action has been bought, sold or received contrary to law, upon the ground that his testimony might tend to convict him of a crime. But no evidence derived from the examination of such person shall be received against him upon a criminal prosecution." Penal Code, § 142.

§ 16. **Bribery.** "A person offending against any provision of any foregoing sections of this Code relating to bribery is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding or investigation, in



the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying to the giving of a bribe which has been accepted shall not thereafter be liable to indictment, prosecution or punishment for that bribery, and may plead or prove the giving the testimony accordingly, in bar of such indictment or prosecution." Penal Code, § 79.

This act is not in violation of art. 1, § 6 of the State Constitution, which provides that no person shall be compelled in any criminal case to be a witness against himself, since this section expressly exempts such witness from all punishment or liability. *People v. Sharp*, 107 N. Y. 427.

Also held, that a witness subpoenaed before a legislative committee is entitled to be protected from the effects of his testimony, and he does not lose this privilege by his failure to claim it at that time. *Id.*

§ 17. **Duelling.** "A person offending against any provision of this chapter (making duelling a crime) is a competent witness against any other person offending in the same transaction, and must not be excused from testifying or answering any question, upon an investigation or trial for an offense under this chapter, upon the ground that his testimony might tend to convict him of a crime. But evidence given by a person so testifying cannot be received against him in any criminal action or proceeding." Penal Code, § 241.

§ 18. **Gaming.** "No person shall be excused from giving testimony upon any investigation or proceeding for a violation of this chapter (against gaming), upon the ground that such testimony would tend to convict

him of a crime ; but such testimony cannot be received against him upon any criminal investigation or proceeding." Penal Code, § 342.

Thus it has been held that a judgment debtor, who loses money by gambling or other games of chance, may, on supplementary proceedings, be required to state where and when he lost his money, with the names of the winners, so that a receiver to be appointed may sue to recover the same back. *Steinhart v. Farrell*, 3 St. Rep. 292. But the indictment of a witness called before a grand jury as a witness to gambling, by the same grand jury, for keeping a gambling house, violates the immunity of the statute. *People v. Spencer*, 48 St. Rep. 803 ; 66 Hun, 149 ; 10 Cr. Rep. 236.

§ 19. **Crimes against the public peace.** "No person shall be excused from giving evidence upon an investigation or prosecution for any of the offenses specified in this title ('Crimes against the Public Peace'), upon the ground that the evidence might tend to convict him of a crime. But such evidence shall not be received against him upon any criminal proceeding." Penal Code, § 469.

§ 20. **Perjury.** "The sections of this Code which declare that evidence obtained upon the examination of a person or a witness shall not be received against him in a criminal proceeding do not forbid such evidence being proved against such person upon any charge of perjury committed in such examination." Penal Code, § 712.

## CHAPTER III.

### THE DEFENDANT AND ACCOMPLICES.

- Sec. 21. The defendant as a witness.
- 22. Cross-examination of.
- 23. Power of court over.
- 24. Accomplices as witnesses.
- 25. Cross-examination of.
- 26. Must be corroborated.
- 27. Extent of corroboration.
- 28. An accomplice defined.
- 29. Decoys, detectives and spies.

§ 21. **The defendant as a witness.** Under the old common law, the lips of the defendant in a criminal action were sealed, and he was debarred from going upon the stand and giving testimony in his own behalf. In England the common law has been relaxed only to the extent of allowing the accused to make an unsworn statement to the jury, but he is not in any sense a witness nor subject to cross-examination.

In two of our states it is held that this right to make a statement is as far as the defendant can go, but those statutes differ somewhat from the practice in England, and also in some particulars from each other. (Florida) McClellan's Dig. c. 101, § 29; Code of Georgia (1882), c. 5, art. 2, § 3854.

In one of our commonwealths the accused may testify in his own favor if he so elects, or he may at his option "make a statement to the jury without being sworn, but the neglect or refusal to make a statement shall not

create any presumption against him, nor shall any reference be made to, nor shall any comment be made upon, such neglect or refusal." R. S. Wyoming Terr. (1887) § 3288.

In other of our states the rule is different, the courts very properly refusing to allow anything relating to testimony to be introduced into a case, unless it comes to the jury under the sanctity of an oath.

In this state it is provided that "the defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him." N. Y. Cr. Code, § 393. This act is permissive, not compulsory, and is therefore constitutional. *People v. Courtney*, 94 N. Y. 490 ; 1 Cr. Rep. 557.

The statute, as is seen, declares that a failure on the part of the accused to take the stand in his own behalf shall create no adverse presumption. Therefore, the court has no right to allude to the failure of the defendant to go upon the stand, in its charge to the jury ; nor has the prosecuting officer any right to refer to such omission or failure on the part of the accused. *People v. Rose*, 52 Hun, 33 ; *Ruloff v. People*, 45 N. Y. 213 ; *Quinn v. People* (Ill.), 15 N. E. Rep. 46 ; *State v. Weddington* (N. C.), 9 S. E. Rep. 577 ; *Cotton v. State*, 87 Ala. 103.

But it has also been held that where the court has committed an error in this respect, a subsequent instruction to the jury that they should draw no adverse inference from such failure to testify cures the error. *Ruloff v. People*, 45 N. Y. 213.

While the law has striven so to arrange it that no adverse presumption shall attach to the accused who

refrains from testifying at all, it makes an entirely different rule when he elects to go upon the stand. In those cases, when the defendant elects to take advantage of his option, he must explain or deny every circumstance which seems, or is, suspicious, in its nature, or which directly tends to his guilt, which has arisen or been developed in the case, and which, unexplained, casts a doubt upon his innocence, or such failure on his part will raise a presumption against him. *Stover v. People*, 56 N. Y. 315 ; *Heldt v. State* (Neb.), 30 N. W. 626 ; *State v. Walker* (Mo.), 9 S. W. 646 ; *Brashear v. State*, 58 Md. 563. Such omission is therefore a subject of comment, and may be so commented on by the prosecuting officer in his address to the jury.

The amount of credit to be given to the testimony of a defendant in his own behalf is a matter for the consideration of the jury. *Spiegel v. Hays*, 118 N. Y. 661 ; *Connors v. People*, 50 N. Y. 240 ; *Brandon v. People*, 42 Id. 265 ; *People v. Moett*, 23 Hun, 60 ; *aff'd* 85 N. Y. 373 ; *Newman v. People*, 63 Barb. 630.

§ 22. **Cross-examination.** When the defendant elects to go upon the stand as a witness in his own behalf, he waives all the rights he previously possessed in regard to answering incriminating questions, and is subjected to the same rules upon cross-examination as any other witness. *People v. Guidici*, 100 N. Y. 507 ; *People v. Casey*, 72 N. Y. 393 ; *People v. Courtney*, 94 Id. 400 ; *Brandon v. People*, 42 Id. 265 ; *Fralich v. People*, 65 Barb. 48 ; *Connors v. People*, 50 N. Y. 440 ; *Stover v. People*, 56 Id. 320.

The defendant, when he goes upon the stand, subjects himself to a searching cross-examination. *People v. Conroy*, 153 N. Y. 187.

When a person charged with murder sets up the defense that the killing was accidental, his failure to call his wife, who was present at the time as a witness, is a fact to be considered by the jury. *People v. Hovey*, 92 N. Y. 560 ; 29 Hun, 389 ; 1 Cr. Rep. 188.

But no adverse presumption is raised against the accused, by reason of his failure to call a witness or introduce testimony, which is as equally accessible to the prosecution as the defense. *People v. Sweeney*, 4 Cr. Rep. 276 ; 41 Hun, 332 ; *State v. Rosier*, 55 Iowa, 517 ; *Com. v. Webster*, 5 Cush. (Mass.) 295.

Neither can any presumption arise against the defendant for his failure to call his accomplice to testify in his favor. *State v. Cousins*, 58 Iowa, 250.

Nor can a failure upon the part of the defendant to call a witness to his good character be considered by the jury as a circumstance adverse to the accused. *Ormsby v. People*, 53 N. Y. 472.

The prosecution is permitted a very wide range as to topics of inquiry, and may require the accused to answer all questions which are relevant to the issue or go to affect his credibility. *People ex rel. Phelps v. Oyer & Terminer*, 83 N. Y. 436 ; *People v. Conroy*, 153 N. Y. 187 ; *People v. Webster*, 139 Id. 83, 84 ; *Clark v. State*, 78 Ala. 474 ; *Com. v. Mullen*, 97 Mass. 545 ; *Com. v. Lannon*, 13 Allen (Mass.), 563 ; *State v. Ober*, 52 N. H. 459 ; *Spies v. People*, 122 Ill. 235 ; *Keone v. People*, 6 Cal. 346 ; *Youke v. State*, 51 Wis. 464 ; *State v. Huff*, 11 Nev. 17 ; *Cowley v. People*, 8 Abb. N. C. (N. Y.) 34.

Thus where the prosecution, in an action for violation of the excise law, proved the witnessing of sales through a glass door, and the defendant swore that there was no glass in the door, held proper to ask him if there was not

glass in the partition of the side of the door. *Com. v. Mullen*, 97 Mass. 545.

Also, upon a trial for selling liquor, it was held competent for the prosecution to ask the defendant, upon cross-examination, how many sales he had made himself, notwithstanding this point had not been inquired about upon his examination in chief. *State v. Wentworth*, 65 Me. 234.

Where the defendant was on trial charged with the killing of his wife, the prosecution was permitted to interrogate him on cross-examination as to his former ill-treatment of his wife. *Disque v. State*, 6 Cent. Rep. 331.

Also, where the defendant was charged with libel, the court held that no error had been committed in permitting the prosecuting attorney to ask the defendant on cross-examination if he was the publisher of the newspaper in question. *Com. v. Morgan*, 107 Mass. 199.

It is also permitted, as affecting the credit of the accused, to ask him as to specific acts, such as his participation in other crimes or offenses. *Spies v. People*, 122 Ill. 235 ; *People v. Casey*, 72 N. Y. 393. In some jurisdictions, while this rule is approved generally, yet it is held that the particular crimes inquired about must relate to the crime at issue, or in some way be part of the same system. *Boyle v. State*, 105 Ind. 469 ; *State v. Huff*, 11 Nev. 17 ; *People v. James*, 57 Cal. 115.

Thus held error to ask one on trial for murder if he had not committed assaults upon other persons than the deceased. *State v. Huff*, 11 Nev. 19. Also, upon trial on an indictment for murder, the court excluded a question asked by the prosecution on the cross-examination of the defendant, as to whether he had not been criminally intimate with the wife of the deceased.

*People v. James*, 57 Cal. 115. Also, held by the court to be an error calling for a reversal of the conviction, where the prosecution was allowed on cross-examination to ask the defendant whether he had assaulted others when drunk. *State v. Carson*, 66 Me. 116.

As has already been discussed, it is proper upon this point to ask the defendant if he has ever been imprisoned in a penal institution, or has been convicted of a crime. See *ante*, § 13. But he cannot be asked whether he has ever been arrested or indicted. See *ante*, § 13.

It has also been held that upon this point the defendant may be asked questions denoting a disregard upon his part of the obligations of domestic relations, or the mode of life usually prescribed by society. Thus where the defendant was upon his trial for an assault with intent to kill, held proper on the cross-examination for the prosecution to ask him as to his desertion of his wife, and as to whether he was not a tramp. *Yanke v. State*, 51 Wis. 464.

It was held, upon a trial for an assault, that the defendant could be asked on his cross-examination whether he had not on a previous occasion assaulted another person. *People v. Irving*, 95 N. Y. 541.

Also, upon the trial of an indictment for selling lottery tickets, it was held that the defendant could be asked on his cross-examination whether he had been in that business before, and had been convicted of mailing lottery circulars. *People v. Noelke*, 94 N. Y. 137.

§ 23. **Power of the court over cross-examination.** The range and scope of cross-examination of the defendant is under the control of the court, and must be subject to the limitation that the matters inquired into must be pertinent to the issue, tend to affect the credi-



bility of the witness, or go to impeach his moral character. *People v. Clark*, 102 N. Y. 735 ; *People v. Noelke*, 94 Id. 137 ; *People v. Oyer & Terminer*, 83 Id. 438 ; *Ryan's Case*, 79 Id. 594 ; *Brown's Case*, 72 Id. 571 ; *People v. Casey*, Id. 394 ; *People v. Crapo*, 76 Id. 290.

Where this limitation is observed, the court will only interfere where there is a great abuse of discretion. *People v. Casey*, 72 N. Y. 393 ; *People v. Oyer, etc.*, 83 Id. 460 ; *Great West. T. Co. v. Loomis*, 32 Id. 127 ; *Le-Beau v. People*, 34 Id. 230.

But where it is apparent that the questions asked are not asked so much to show the legitimate objects of the cross-examination as to excite the prejudice of the jury against the accused, the court may properly exercise its discretionary power of interference. *People v. Brown*, 72 N. Y. 571 ; *Clarke v. State*, 48 Ala. 474.

Upon this point the court has wisely said : "The discretion which courts possess to permit questions of particular acts to be put to witnesses for the purpose of impairing credibility should be exercised with great caution when an accused person is a witness on his own trial. He goes upon the stand under a cloud ; he stands charged with a criminal offense not only, but is under the strongest possible temptation to give evidence favorable to himself. His evidence is therefore looked upon with suspicion and distrust ; and if in addition to this he may be subjected to a cross-examination upon every incident of his life, and every charge of vice or crime which may have been made against him, and which have no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict upon evidence which otherwise

would be deemed insufficient." *People v. Crapo*, 76 N. Y. 288.

§ 24. **Accomplice as witness.** It has always been the rule, subject to restrictions, to allow an accomplice of those on trial charged with crime to give testimony against his fellows. In England such testimony is not allowed as a matter of course, but leave must first be obtained from the court to that effect ; and it seems that the general practice of that country is to refrain from granting the request of the prosecution in this regard, until the court has been assured that without such evidence it would be improbable that a conviction could be obtained. Roscoe's Cr. Ev. 8th Ed. § 130. It also would appear that this consent is not sufficient in itself to render the accomplice competent as a witness in those courts, until he has first been acquitted of the crime at issue, which acquittal is usually obtained by a direction of the court to the jury to that effect, before the trial of the co-defendant is brought on. *Id.* This rule also appears to be in force in some of our states. *Meyers v. State*, 3 Tex. App. 8 ; *State v. Roberts*, 15 Mo. 28 ; *Fitzgerald v. State*, 14 Mo. 413.

In this country, however, the general rule is that an accomplice is competent as a witness either for or against the other defendants unless jointly indicted, and even then if separately tried. *Salander v. People*, 2 Colorado, 48 ; *State v. Crowley*, 33 La. Ann. 782 ; *State v. Dietz*, 67 Iowa, 220 ; *Parsons v. State*, 43 Ga. 197 ; *Lee v. State*, 21 Ohio St. 157 ; *Compton v. State*, 11 Fla. 247 ; *McKenzie v. State*, 124 Ark. 636 ; *People v. Whipple*, 9 Cow. (N. Y.) 707 ; *People v. Garnett*, 29 Cal. 622 ; *People v. Costello*, 1 Den. (N. Y.) 83 ; *Foster v. People*, 18 Mich. 266 ; *Allison v. State*, 14 Tex. App. 402 ; *Crass v.*

*People*, 49 Ill. 152 ; *U. S. v. Hunter*, 1 Cranch. (D. C.) Co. Ct. 446 ; *State v. Pattie*, 42 Vt. 495 ; *Lindsay v. People*, 63 N. Y. 143 ; *State v. O'Brien*, 3 Vroom (N. J.), 414 ; *Carroll v. State*, 5 Neb. 31 ; *Lee v. State*, 51 Miss. 566 ; *Lucre v. State*, 7 Baxter (Tenn.), 148 ; *U. S. v. Hanway*, 2 Wall Jr. (U. S.) 139 ; *Crutchfield v. State*, 7 Tex. App. 65 ; *Jeffries v. Com.*, 84 Ky. 237 ; *State v. Gigher*, 23 Iowa, 318. It would also appear that the fact that the accomplice had been promised immunity for so testifying possesses no disqualifying effect, since it is to the confessions of the defendant alone that the rule in regard to confession given under such circumstances applies. *People v. O'Neil*, 48 Hun, 36 ; 109 N. Y. 251. In this state co-defendants and accomplices are competent witnesses without the consent of the court. *People v. Jaehne*, 103 N. Y. 182 ; *People v. O'Neil*, 109 Id. 251.

In those states where the rule is still in force, that an accomplice cannot be a witness unless the assent of the court is first obtained, it does not appear that it is necessary that such consent should be expressed in any prescribed form, nor that any previous order to that effect should have been made.

Neither does it seem to have any bearing upon the question of the competency of the accomplice, whether he desires or consents to become a witness, but may be forced to testify by either party, when he is otherwise competent, and may be compelled to answer all questions which may be put to him. He is, however, clothed with the same privileges pertaining to other witnesses, in regard to answering questions incriminatory in their nature. It has been held, however, that this privilege does not exist, where it is provided by statute that under certain circumstances no answer of the witness can be

used against him upon any subsequent criminal proceedings, since under those conditions the witness is abundantly protected, and in those cases he must answer make to all questions. *Bedgood v. State* (Ind.), 17 N. E. Rep. 621, 623.

Also, where the accomplice is aware of his privilege to refuse to answer certain questions, and yet gives incriminatory testimony, he must continue in his course, and cannot halt just before the climax and claim his privilege. *Foster v. People* (Mich.), 8 Am. L. Reg. N. S. 494; *Com. v. Price*, 10 Gray (Mass.), 472.

§ 25. **Cross-examination of.** Upon the cross-examination of an accomplice, the defense are allowed great latitude for the purpose of impeaching his credit as a witness, and casting doubt or suspicion upon his testimony. *Marler v. State*, 67 Ala. 55. He is bound to disclose his own turpitude in the transaction for which the accused is on trial. *Atherton's Case*, 1 C. H. Rec. 159.

Thus it may be shown that the accomplice has been promised some substantial benefit from the state, or, if no promise has been given, that he expects to gain some reward or favor from his course. *People v. Langtree*, 64 Cal. 256; *U. S. v. Hinz*, 35 Fed. Rep. 272.

Also, held reversible error to refuse to permit the defense to show by cross-examination that the accomplice testifying against his co-defendant had been promised money if he would testify for the state in the manner and substance he was doing. *Tullis v. State*, 30 Ohio St. 200.

Also, a new trial was granted, where the court refused to permit the question addressed on cross-examination, to the accomplice testifying for the prosecution against his fellow: "If Allen is convicted, do you expect to be

prosecuted?" The appellate court held that the defense was entitled to show that the witness "expected to be a gainer" by the conviction of the defendant. *Allen v. State*, 10 Ohio St. 287.

It has also been held that a person who turns state's evidence and swears to an offense in which he participated, thereby waives his privilege against criminating himself in that matter, and has no right to set it up as to statements made to his counsel, or refuse answering himself. This privilege and all others are waived by a state's evidence in regard to the facts in controversy. He must disclose fully. *Hamilton v. People*, 29 Mich. 174.

To preserve this privilege in such cases might work the greatest injustice toward the party on trial, since it might withhold the only means of contradicting and impeaching the accomplice. *Jones v. State*, 65 Miss. 179.

If an accomplice fully aware of his privileges still volunteers as a witness in a criminal case, he must answer all questions, and cannot be allowed to state only such facts as he pleases, and withhold other facts. *Com. v. Price*, 10 Gray (Mass.), 472.

§ 26. **Accomplice must be corroborated.** While the law permits an accomplice to testify against his fellows, and declares him to be a competent witness in all legal proceedings, yet the courts and legislature in the majority of the states, clearly perceiving the danger always surrounding testimony of this character, have wisely declared that no man shall be convicted of an offense upon the uncorroborated testimony of his accomplice. It seems the contrary is the rule in England, and in that country a prisoner may be convicted upon the uncorroborated evidence of his accomplice. Roscoe's Ev. 8th Ed. p. 201.

The law in this respect, in the United States, is much more in keeping with the principles of common sense, as well as with those of justice. In the first place, such evidence is almost invariably given through feelings of hatred, envy, malice or revenge toward the defendant, or else from the hope of some benefit, express or implied. Now experience has demonstrated to all men that the individual who bears witness through enmity, or for his own future or present advantage, is not at all likely, on the one hand, to lessen the value of his services by withholding aught which will increase his importance, and on the other hand will not be backward in adding details or giving a color to events which they may not rightfully be entitled to. We have unfortunately many cases where malignity, covetousness or fear has indeed impelled the accomplice to manufacture facts from slight foundations, or wholly fabricate his statement.

Such being the indisputable facts regarding the testimony of accomplices, it necessarily follows that their evidence should always be carefully scrutinized, and facts showing criminality should be proved, independent of such evidence. The enlightened state of the criminal law in most of the states is fully exhibited in its dealing with this question, by which it is explicitly declared, that no conviction shall take place upon the uncorroborated testimony of an accomplice; but, on the contrary, it is indispensable that he be corroborated by other evidence, which tends to connect the accused with the commission of the crime of which he stands charged. *State v. Chyo Chiack*, 92 Mo. 395; *Irwin v. State*, 1 Tex. App. 301; N. Y. Cr. Code, § 399; *U. S. v. Troax*, 3 McLean, 224; *Com. v. Holmes*, 127 Mass. 424; *Com. v. Snow*, 111 Id. 411; *Carroll v. Com.*, 84 Penn. St. 107; *State v. Willis*,

9 Iowa, 582 ; *State v. Schlegel*, 19 Id. 169 ; *Upton v. State*, 5 Clark, 465 ; *People v. Clough* (Cal.), 15 ; Pac. Rep. 5 ; *Childer v. State*, 52 Ga. 106 ; *Green v. State*, 55 Miss. 454 ; *Craft v. State*, 3 Kan. 450 ; *Bowling v. Com.*, 74 Ky. 604 ; *State v. Bayne*, 23 La. Ann. 78 ; *State v. Stanley*, 48 Iowa, 221 ; *Lumpkin v. State*, 68 Ala. 56 ; *Territory v. Neligh* (Ariz.), 10 W. Coast Rep. 209 ; *Contra, Bacon v. State*, 32 Fla. 51 ; *People v. O'Brien*, 60 Mich. 8 ; *Allen v. State*, 10 Ohio St. 288 ; *Stocking v. State*, 7 Ind. 326 ; *Collins v. People*, 98 Ill. 584 ; *State v. Hayer* (Vt.), 10 N. J. 398 ; *State v. Holland*, 83 N. C. 624 ; *State v. Pattier*, 42 Vt. 495 ; *State v. Litchfield*, 58 Me. 267 ; *State v. Betsall*, 11 W. Va. 703 ; *State v. Stebbins*, 29 Conn. 463.

In New York State, such corroboration is required by statute: "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime." Cr. Code, § 399.

Corroboration of an accomplice's testimony is absolutely essential. *People v. Mahoney*, 73 Hun, 601 ; 56 St. Rep. 143 ; 26 Supp. 257 ; *People v. Davis*, 21 Wend. 309 ; *People v. Evans*, 40 N. Y. 1.

It has also been held that though there be other evidence besides that of an accomplice which tends to connect the defendant with the commission of the crime charged, the defendant is entitled to have the jury charged that no conviction can be had upon his testimony unless he be corroborated by such evidence as tends to connect the defendant with the crime at issue. *People v. Thomson*, 3 Cr. Rep. 562. But held no error for the court to refuse to charge in relation to such facts, "that they must be inconsistent with the innocence of the de-

fendant and exclude every hypothesis but that of guilt." *People v. Ogle*, 104 N. Y. 511 ; aff'g 4 Cr. Rep. 349.

But a person who, without knowledge of a burglary, innocently assists in secreting the proceeds thereof, is not such an accomplice whose testimony requires corroboration. *People v. Ricker*, 7 Cr. Rep. 19 ; 22 St. Rep. 652 ; 4 Supp. 70. Neither does this rule as to corroboration apply when the alleged accomplice denies that he is guilty of criminality. It is only operative in those cases where the witness goes upon the stand and acknowledges his guilt, but not where the witness appears in obedience to a subpoena and denies all complicity in the offense at issue. *Pollock v. Pollock*, 71 N. Y. 137.

§ 27. **As to extent of corroboration.** The next question to be considered is the extent to which corroboration must go, in order to meet the requirements of the law in that respect. In the first place the corroboration must be outside of the testimony given by the accomplice, and therefore one or more accomplices cannot corroborate each other, but, the testimony of each accomplice must be corroborated by other evidence. *State v. Williamson*, 42 Conn. 261 ; *U. S. v. Hinz*, 35 Fed. Rep. 272 ; *Com. v. Price*, 10 Gray (Mass.), 472 ; *Rex v. Nookes*, 5 C. & P. (Eng.) 326.

It is manifest that the law does not imply that the corroboration under consideration must be complete in every detail and upon each point, for should such be the intention of the law, the testimony of the accomplice would be unnecessary. The rule has been stated to be as follows : "In cases where corroboration is required, there has been some diversity of opinion in the authorities as to the particular facts which should be corroborated, and the extent of the corroboration needed in order to com-



ply with the rule ; but it is now conceded to be the general rule that it should tend to show the material facts necessary to establish the commission of a crime, and the identity of the person committing it. When an offense was formerly proven by accomplices, it was the usual practice of trial courts to advise an acquittal, unless such evidence was in some respects corroborated by other testimony (although at common law a conviction upon the evidence of the accomplice alone was sustainable). In those cases the extent and degree of corroboration rested in the discretion of the trial court, and necessarily varied according to the circumstances of the case. Although such cases are not strictly analogous to those where corroboration is required by statute, they yet furnish some help in determining the degree of proof required in the latter case." *People v. Plath*, 100 N. Y. 592. The court also says : " It is not necessary that the corroborative evidence of itself should be sufficient to show the commission of the crime, or connect the defendant with it. It is sufficient if it tends to connect the defendant with the commission of the crime. Nor need the corroborative evidence be wholly inconsistent with the theory of the defendant's innocence. The court, before it should submit the case to the jury, should be satisfied that there is some corroborative evidence fairly tending to connect the defendant with the commission of the crime, and when there is, then it is for the jury to determine whether corroboration is sufficient to satisfy them of the defendant's guilt. As we said in *People v. Everhardt*, 104 N. Y. 591, the law is complied with if there is some evidence fairly tending to connect the defendant with the commission of the crime, so that the connection will not rest entirely upon the evidence of the accom-

plice." *People v. Elliott*, 106 N. Y. 292 ; 7 Cr. Rep. 126 ; 8 St. Rep. 703. See also *People v. O'Neil*, 109 N. Y. 267 ; *People v. Jaehne*, 103 Id. 282 ; *People v. Hoogkerk*, 96 Id. 149 ; *People v. Ryland*, 97 Id. 126 ; *People v. Sherman*, 103 Id. 513 ; *People v. Ricker*, 7 Cr. Rep. 22 ; *People v. McCallam*, 6 Id. 543 ; aff'd 4 St. Rep. 291 ; 103 N. Y. 587 ; *People v. Sharp*, Id. 388 ; *People v. Thompson*, 3 Id. 562 ; *People v. Range*, 3 Id. 85 ; *Berry v. People*, 1 Id. 57 ; *People v. Kerr*, 6 Id. 406 ; *People v. Courtney*, 28 Hun, 589.

Corroborative evidence which the jury may fairly and reasonably consider as tending to connect the accused with the commission of the crime charged is sufficient to sustain a conviction on the testimony of an accomplice. *People v. Christian*, 78 Hun, 28 ; 60 St. Rep. 814 ; 29 Supp. 271 ; *State v. Welles*, 9 Iowa, 582.

The same principle was laid down in a trial for murder, where the accused was convicted upon the testimony of an accomplice, and it was held that the jury were justified in finding that the evidence of the accomplice had been sufficiently corroborated by the other evidence in the cause. *People v. Wayman*, 38 St. Rep. 747 ; 128 N. Y. 585.

The general rule seems to be that while the corroboration should be of some fact deposed to which goes to show the guilt of the accused independent of the testimony of the accomplice, yet it is not required that such testimony be corroborated in every material part, nor that the whole case should be proved outside the testimony of the accomplice. *Craft v. State*, 3 Kan. 450 ; *People v. Hoogkerk*, 96 N. Y. 149. But where the defendant was charged with forgery, the corroboration merely consisted in showing that the accused was present at the bank at the same time, and his statement made

some time after the passing of the check and while under arrest, that he knew the guilty party. The court held that the corroboration was insufficient to secure a conviction. *People v. Elliott*, 5 Cr. Rep. 204.

On the other hand, when the accusation was larceny of sheep, and a search of the premises of the accused and the home of the accomplice resulted in finding the feet of sheep which resembled each other, and where the skins of sheep were found where the accomplice had stated them to be hidden, it was held sufficient corroboration. Roscoe's Ev. (Eng.), p. 203. But where the accused were upon their trial for an assault in which the complainant was attacked by four unknown men, from one of whom he had torn a piece from his coat during the struggle, by which the assailant was afterwards discovered. The latter turned state's evidence and testified against all the defendants. His was the only evidence connecting them with the crime, and the court held it sufficient to convict. *Smith's and Davis' Case* (Eng.), 1 Leach, C. C. 479.

But where the accused was charged with altering a forged check, and the corroboration of the testimony of the accomplice consisted in the fact that the defendant was seen in the company of the accomplice about the time the offense occurred, and under circumstances suspicious in their nature, the court held the corroboration to be insufficient. *People v. Courtney*, 1 N. Y. Cr. Rep. 64.

But upon a trial for forgery, where the corroboration consisted in showing that the defendant had visited the office of the party whose name was forged, under a false pretense, that while there he had the opportunity to look at the party's cancelled checks and that some of such checks disappeared simultaneously with his departure

from the office. Held sufficient to justify the finding of the jury. *People v. Everhardt*, 104 N. Y. 592. Also, proof that a boy who had stolen a horse was at the defendant's at the latter's invitation, and that the route the boy should take was traced on paper in the defendant's handwriting, was held sufficient to corroborate the boy's testimony that the defendant participated in the stealing. *People v. Wiley*, 48 St. Rep. 498 ; 20 Supp. 445.

A wife of an accomplice may be used to corroborate the testimony of her husband. *State v. Moon*, 25 Iowa, 128 ; *Blackburn v. Com.* 12 Bush (Ky.), 180 ; *People v. Everhardt*, 104 N. Y. 592. It has also been held that a confession or admission of the accused is competent and sufficient corroboratory evidence. *People v. Cleveland*, 49 Cal. 578.

While an accomplice is generally used against his fellow defendant, yet he is also competent for his co-defendant, and may give evidence for him. *Moore v. Tracey*, 7 Wend. 229 ; *Makesey v. People*, 6 Park, 114.

§ 28. **Accomplice defined.** Since we have seen the position in which an accomplice stands in the eyes of the law it will be well to understand exactly what acts or conduct on the part of the individual bring him within the classification of being an accomplice with those standing trial.

An accomplice is defined as one who "knowingly, voluntarily and with common intent with the principal offender, unites with him in the commission of a crime." Whart. Cr. Ev. § 440. This participation, however, must be wilful and real, for co-operation given with no criminal intent but induced through ignorance of the nature or character of transaction, from being accidentally present, or voluntarily entered into for no other purpose save to

expose and punish the perpetrator of the contemplated crime, does not bring the individual standing in such a position within the definition of accomplice. *State v. McKean*, 36 Iowa, 343; *People v. Noelke*, 94 N. Y. 137; *People v. Smith*, 1 N. Y. Cr. Rep. 72; *People v. Farrell*, 30 Cal. 316; *People v. Barrie*, 49 Id. 342.

Thus one who purchases liquor sold in violation of law is in no sense to be considered as an accomplice of the person making such illegal sale. *William v. State*, 55 Ga. 391; *Com. v. Downing*, 4 Gray (Mass.), 29; *People v. Smith*, 1 N. Y. Cr. Rep. 72; *Trustees, etc., v. Moore*, 18 Ill. 407. Also, one who purchases a lottery ticket for the sole purpose of detecting and aiding in the conviction of the individual making a sale in violation of the laws against lotteries, is not an accomplice. *People v. Noelke*, 94 N. Y. 137; *U. S. v. Moore*, 19 Fed. Rep. 39; *Bates v. U. S.*, 10 Id. 92; *U. S. v. Whittier*, 5 Dillon (U. S.), 35, 39; *U. S. v. Cottingham*, 2 Blatchf. (U. S.) 470.

Thus it has been held that the female upon whom an abortion was performed is not to be regarded as an accomplice, but rather as the victim. *People v. Vedder*, 98 N. Y. 630; 3 Cr. Rep. 32; *People v. Bliven*, 112 N. Y. 79; nor a woman who accompanies another to a physician's office, when the latter submitted, but not in the presence of the former, to an operation for abortion. *Com. v. Drake*, 124 Mass. 21. A person who in no way aided or abetted in a murder, but in whose hands a knife was placed by the murderer after the murder, is not an accomplice. *People v. Ogle*, 6 Cr. Rep. 165; 104 N. Y. 511. An informer, it has been held in some states, does not come under the head of an accomplice. *State v. McKean*, 36 Iowa, 343; *People v. Farrell*, 30 Cal. 316. But on what principle such a broad and unlimited rule

can be applied it is difficult to see, for if he had knowingly, and for no proper motives, joined in the commission of the crime, touching which he gives his testimony, he most clearly falls under the definition of an accomplice. Every accomplice, when he turns state's evidence, does by that very act become an informer, and, therefore, to lay down the sweeping rule that no informer is to be classified as an accomplice, would render the accepted legal definition of an accomplice as of little value.

§ 29. **Decoys, detectives and spies.**—The rules regarding accomplices do not apply to detectives, or decoys used for detecting the criminals, who may join any organization, or ally themselves with individuals, for the express purpose of ferreting out the crimes or illegal conduct or methods of those with whom they join themselves. None of the discredit or suspicion which attaches to the testimony of accomplices clings to them, nor are they or their testimony subjected or governed by any of those restrictions which apply to that given by accomplices. *Campbell v. Com.*, 84 Penn. St. 187; *State v. McKean*, 36 Iowa, 343; *Com. v. Wood*, 11 Gray (Mass.), 86; *People v. Smith*, 28 Hun (N. Y.), 626; *Com. v. Cohen*, 127 Mass. 282; *Berry v. People*, 77 N. Y. 588; *Com. v. Willard*, 22 Pick. (Mass.) 476; *Rex v. Mullins* (Eng.), 3 Cox, C. C. 526; *Trustees, etc., v. O'Malley*, 18 Ill. 407; *People v. Farrell*, 30 Cal. 316; *People v. Noelke*, 94 N. Y. 138; 29 Hun, 461; 1 Cr. Rep. 257; *People v. Emerson*, 6 Cr. Rep. 157. That a prejudice naturally rises against such persons is undoubted, for the average man looks with little favor upon men who, under the guise of friendship, and through the feelings of confidence they have inspired, betray such confidence, and use it to the undoing of those by whom they were trusted. But as has been concisely stated by a

learned court : " Informers or spies may be abhorred and odious, not by reason of denouncing and giving information against crimes and criminals, but for their association and participation in lawless practices. We should not, therefore, mistake and denounce the only act through which society finds redress, instead of the crimes and criminals thus brought to light." *Trustees, etc., v. O'Malley*, 18 Ill. 407.

Of course the question may arise as to the truth of the claim made by such a witness as to his purpose in participating in the illegal proceedings at issue, being solely to procure evidence against the criminals. Therefore, in order to determine whether the witness was an accomplice in fact, and that his participation in the event was for the purpose of detecting crime, and not for the object of committing the crime, is the vital point, and the question of interest is to be decided by the jury. *People v. Bulanger*, 71 Cal. 17 ; *Wright v. State*, 7 Tex. App. 545.

The fact that encouragement was given to the defendant to commit the crime by the prosecutor, or that an opportunity so to do was offered, does not constitute a defense, unless the original intent to commit the crime was also induced by the complainant or other person. *People v. Hanselman* (Cal.), 18 Pac. Rep. 425 ; *Saunders v. State* (Tenn.), 30 Am. Rep. 130, *n.* ; *Dodge v. Brittain*, Meigs (Tenn.), 84.

Upon this point it has been held : " They (the cases) none of them go further than to say that a man may direct a servant to encourage the design of the thieves, and so lead them on until the offense is complete, so long as he did not induce the original intent, but only provided for its discovery after it was formed." *Dodge v. Brittain*, Meigs (Tenn.), 84.

Thus, where the prosecutor had been informed that the defendants would attempt to steal his meat from the smoke-house on a certain night. He left the door unfastened and concealed himself with others, and seized the defendants after they had entered the smoke-house and were about to carry away the meat. Held that it was not error to charge that if the stealing was the act of one E., and with the consent of the prosecutor, and the defendants only aided and abetted E., the former were not guilty ; but otherwise if the plan was only to detect the crime, and not bring it about. *Saunders v. State* (Tenn.), 30 Am. Rep. 130, *n.* Also, where a detective gave information of an intended burglary, the proprietor of the building left the rear door unfastened, contrary to his usual custom, and the defendant and the detective entered by that door, the defendant opening it. Upon entering the defendant was arrested by the police, who were lying in wait with the proprietor inside. It was held not error to refuse to charge that this was not burglary, and leave it to the jury whether the proprietor consented or not. *State v. Jansen*, 22 Kan. 498. But where a banker suspected that the defendant intended to rob his bank, and employed detectives to act as decoys and induce him to enter the bank with intent to rob it, the court held that the evidence was insufficient to warrant a conviction for burglary. *Speiden v. State*, 3 Tex. App. 156. Also, where the detective urged the defendant to commit the burglary, and, acting under directions from the owner, induced the defendant, who was reluctant and timid, to accompany him to the building, where the detective opened the doors with keys furnished him by the owner, the court held there was no breaking on the part of the defendant. *Allen v. State*, 40 Ala.



344. In another case where this question arose the court used the following language :

“The defendant had actually entered into an agreement to burglariously enter the house with intent to commit a theft, and the offense of conspiracy is complete, although the parties conspiring do not proceed to effect the object for which they have so unlawfully combined. The fact of such conspiracy once being established, the subsequent consent of the owner (or those acting for him) for the conspirators to enter the building will not affect their guilt in the least, unless the evidence shows that H. and G., or the detective employed by them, suggested the offense, or in some way created the original intent or agreement to commit the offense as charged.” *Johnson v. State*, 3 Tex. App. 590. It has also been held that “a violation of law by one person, in order to detect an offender, will not excuse the latter or be available to him as a defense.” *U. S. v. Whittier*, 7 Cent. L. J. 51.

Whenever the evidence of a detective or decoy has been given against the accused, the latter has the right to give any explanation regarding the matter as he may desire. Thus where the defendant had been decoyed into committing the crime, the appellate court held : “If he (the officer) testified truly, he was apparently conniving at and assisting in the crime charged ; and though he may have done this, as he says, not by way of enticing defendant into crime, but only by allowing him the opportunity he sought and requested, yet it placed him in an equivocal position, and the jury ought to have had the benefit of all the light the former dealings of the parties would have thrown upon the transaction.” *Saunders v. People*, 38 Mich. 218.

Decoy letters are also allowable for the purpose of

exposing vice or detecting crime. "The use of decoy letters has ever been employed, without bringing upon those who use these means the imputation either of crime or of participation therein." *Com. of Excise v. Backus*, 29 Hun (N. Y.), 33, 42 ; to the same effect, *U. S. v. Slenker*, 32 Fed. Rep. 691. Thus, where an officer, desiring to discover whether the defendant was using the United States mail to send lottery tickets, sent defendant the price of a lottery ticket in a letter, and in return received through the mail a lottery ticket, such evidence was held proper, and the witness was not to be discredited, merely for resorting to such means to detect the violation of law. *U. S. v. Moore*, 19 Fed. Rep. 39 ; *Bates v. U. S.*, 10 Id. 92 ; *U. S. v. Whittier*, 5 Dillon (U. S.), 35 ; *U. S. v. Cottingham*, 2 Blatchf. (U. S.) 470.

## CHAPTER IV.

### UNDER SECTIONS 829 AND 830 CODE CIVIL PROCEDURE.

- Sec. 30. Preliminary.
- 31. Application of.
- 32. Interest that disqualifies.
- 33. What interest does not disqualify.
- 34. Mortgagees and mortgagors.
- 35. Promissory notes.
- 36. Partnerships.
- 37. Personal transactions.
- 38. Claims against an estate.
- 39. Books of account,
- 40. Conversations that are incompetent.
- 41. Conversations that are competent.
- 42. Conversations between deceased and third persons.
- 43. The rule in other cases.
- 44. Testimony in own behalf.
- 45. In behalf of co-plaintiff or co-defendant.
- 46. Administration.
- 47. Deriving title or interest.
- 48. Declarations of deceased.
- 49. Negative and affirmative.
- 50. Indirect evidence.
- 51. Proceedings under the will.
- 52. Objections to witness.
- 53. Competency restored.
- 54. Under section 830.

§ 30. Preliminary. Prior to the adoption of the Code of Procedure, no party to an action was competent to testify as a witness in his own behalf. This prohibition was also so extended as to exclude from the witness box all persons interested in the event of the controversy, unless the testimony so given was adverse to the interest of the party testifying.

By the adoption of the Codes, a procedure more in keeping with the spirit of the age was gradually adopted, which did away with these restrictions so long imposed, until at the present time they no longer exist, except in those designated and specified cases set forth and particularized in the following section of the Code :

“ Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section, by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof.” Code Civil Procedure, § 829.

§ 31. **Application of.** By the words of the statute its instructions apply only to “actions or the hearing upon the merits of a special proceeding,” and are therefore not applicable to motions or other introductory proceed-

ings. The spirit or meaning alone of this statute are not enough to cause the exclusion of evidence, but the case must be brought strictly within the wording of the section. *Severn v. Nat. Bank of Troy*, 18 Hun, 228; *Lobdell v. Lobdell*, 36 N. Y. 327.

Thus one creditor cannot raise the objection that the claim allowed by the executors was proved by the party in interest. *Estate of Le Baron*, 6 Civ. Pro. Rep. 62.

The statute does not apply in a proceeding brought against an attorney to compel him to pay over money. *Re Purdy v. Stewart*, 16 Week. Dig. 284. Nor to the verification of claims against decedent's estate. *Matter of Frazer*, 92 N. Y. 239.

It has also been held that it does not apply where the plaintiff sued the defendant on an account, and latter set up an account which originally existed in his favor against plaintiff's father, alleging that the former had assumed all his father's debts for a valuable consideration, and offered himself as a witness to prove such transaction had with deceased. *Stephens v. Cornell*, 32 Hun, 414.

Neither can the statute be invoked in proofs of loss made to an insurance company by a person interested, although they relate to personal transactions with the deceased. *Cannon v. N. W. M. L. Ins. Co.*, 29 Hun, 470.

As to whether the restrictions apply to proofs submitted by an alleged creditor for the purpose of enabling the surrogate to fix the penalty of a bond, the courts do not seem decided. *Matter of Musgrave*, 5 Dem. 427.

But it is applicable to matters of probate. *Snyder v. Sherman*, 88 N. Y. 656. Also to examinations in surrogates' courts. *Angevine v. Angevine*, 48 Barb. 417. Also to proceedings for judicial settlements of the ac-

counts of executors and others. *Burnett v. Noble*, 5 Redf. 69. Also to examinations under sections 2706 and 2710 of the Code of Civil Procedure, to discover concealed effects of deceased persons. *Tilton v. Ormsby*, 10 Hun, 7; aff'd 70 N. Y. 609. The same ruling is made upon trial of cases relating to the execution of a will. *Hatch v. Peugnet*, 64 Barb. 189. Also in proceedings brought for a share in the estate of a deceased father. *Marsh v. Brown*, 18 Hun, 319. Also upon references of disputed claims against estate of decedent. *Strong v. Dean*, 55 Barb. 337; *Campbell v. Hubbard*, 23 Week. Dig. 3. The statute means by "deceased persons" only the person whose estate is involved in the proceedings at issue, and none other. *Matter of De Baun*, 1 Connolly, 203; 4 Supp. 342; 20 St. Rep. 873.

§ 32. **Interest that disqualifies.** It is very important in this connection to know what degree of disqualifying interest is intended by the statute. The interest which renders a witness incompetent must be certain and vested, and not contingent. The true test of such interest is whether the witness will either lose or gain by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. *Wallace v. Straus*, 113 N. Y. 238; *Barton v. Scannling*, 31 Hun, 467; *Moore v. Oviatt*, 35 Hun, 216; *Matter of Hanley*, 44 Hun, 559; *Ehrman v. Scheuman*, 14 St. Rep. 705; 22 Id. 984; 26 Id. 840; 18 Civ. Pro. Rep. 8; *Hobart v. Hobart*, 62 N. Y. 80; *Connelly v. O'Connor*, 117 N. Y. 91; *Matter of Montgomery*, 28 N. Y. 282; *Sherman v. Kaufman*, 1 Dem. 39; *Todd v. Dibble*, 6 Id. 35; *Matter of Masterton*, Id. 460.

Neither is an attorney competent who has worked under a contingency contract. *Sherman v. Scott*, 27

Hun, 331 ; 2 Civ. Pro. 366. Neither, upon a disputed claim against an estate for board of relatives of the deceased, is the plaintiff a competent witness to the agreement. *Heyne v. Doefler*, 124 N. Y. 505.

In many cases the wife of a party has been excluded.

Thus, where a decedent left real estate in which the wife of a contesting heir would have an inchoate right of dower, should the will be declared void, she was held to be interested in the event of the action. *Steele v. Ward*, 30 Hun, 555.

Also, in an action brought by the heirs of a deceased grantor to set aside his conveyance on the ground of undue influence, his widow, who as his wife had joined him in the conveyance, is a person so interested as to be rendered incompetent to testify to transactions with the deceased. *Sanford v. Ellithorp*, 95 N. Y. 48.

Also held, that the wife of the plaintiff in an action for specific performance of a contract to convey land is an interested person. *Erwin v. Erwin*, 54 Hun, 166 ; 18 Civ. Pro. 11. Neither can a widow testify to transactions or communications with her deceased husband, as to the execution of his deed of land in which she joined, in her action to set the same aside for fraud. *Witthaus v. Schaak*, 105 N. Y. 332 ; 7 St. Rep. 345 ; rev'g 38 Hun, 560.

Also held, in an action to enforce specific performance of a contract to convey land with life lease to grantor and wife, that the latter, the widow of the grantor, was incompetent to testify to declarations of the deceased, as against his heirs at law. *Devinney v. Corey*, 1 Silv. Sup. Ct. 148.

Also held, that a question to the widow as to who provided for the family was inadmissible. *Denise v. Denise*,

41 Hun, 9 ; 2 St. Rep. 175. But a widow was held to be a competent witness as to a transaction between herself and deceased husband at the time of the assignment of a life insurance policy on his life, held by her as security, in an action brought by her against one claiming under such assignment. *Barry v. Eq. L. A. Soc.*, 59 N. Y. 587.

But it has been held that the mother of the testator may testify to his age. *Matter of Paige*, 62 Barb. 476.

The fact that the witness was surety upon the bond of a non-resident executor was deemed to disqualify him. *Miller v. Montgomery*, 78 N. Y. 282. But it has also been held that the principal debtor may testify in an action against his surety. *Wallace v. Strauss*, 113 N. Y. 238. It also seems that one upon the indemnity bond of a sheriff or constable would be incompetent to testify in an action against such officer for an improper levy. *Holland v. Willetts*, 9 N. Y. 170.

Neither can a deputy sheriff, who made a levy for the execution of which a judgment has been obtained against the sheriff, testify in the latter's behalf, who seeks to recover from the estate of the attorney, as to a parol promise of indemnity from the decedent. *Barton v. Scramling*, 31 Hun, 467.

But the words of the statute are limited to the particular issue or question concerning which the witness is to be examined. *Moore v. Oviatt*, 35 Hun, 216.

And the interest intended by the section is a present and fixed one,—a legal interest in the judgment at the time the witness was sworn. *Gourlay v. Hamilton*, 41 Hun, 437 ; 1 State Rep. 555 ; *Matter of Hanely*, 44 Hun, 559.

The fact that the witness was not interested at the



time the transaction or communication occurred has no bearing upon the question of competency, if there has been an interest acquired since. *Farnsworth v. Ebbs*, 2 Hun, 438 ; *Contra, Gross v. Wilwood*, 9 St. Rep. 587.

Thus a possible interest as a tenant by the curtesy is not such an interest as will disqualify a witness. *Matter of Clark*, 40 Hun, 252. Also, where a married woman brought an action to recover back money loaned by her on an oral contract for the purchase of lands, against the executors of the deceased vendor, it was held that her husband could testify in her behalf as to transactions and conversations with deceased relating thereto. *Fogal v. Page*, 13 N. Y. Supp. 636.

In an action of partition brought by a daughter against the widow and son, the former put in no answer, while the latter alleged that certain land had been conveyed to the granddaughter by his deceased father as an advancement which should be set off against the share allotted to her. The widow, who had joined in the deed, was held competent to testify upon the trial to prove that deed was given without consideration. *Moore v. Oviatt*, 35 Hun, 216.

Also held, in an action by a trustee against the executor of his co-trustee to have lands standing in the name of the deceased trustee declared part of the trust estate, that the husband of a deceased sister of said trustee whose children were interested in the estate did not possess a disqualifying interest. *Conklin v. Snider*, 104 N. Y. 641 ; 5 St. Rep. 556.

The plaintiff, in an action of ejectment, in which he claimed title as the son and heir of the deceased, was allowed to prove a message between the deceased and his mother, by the testimony of the latter. *Eisenlord v.*

*Clum*, 126 N. Y. 552 ; 38 St. Rep. 446. Also, in a suit of a like nature, where the plaintiff claimed under the will of the deceased, and the defendants alleged that the deceased was a grantee of a partnership, the surviving partners of which were the owners, it was permitted the grantor of deceased to testify as to what took place at the time of the execution of the deed. *Rank v. Grote*, 110 N. Y. 12 ; 16 St. Rep. 724.

In an action for partition, where the plaintiff claimed as heir, while the defendant averred title to one portion under a deed from the deceased, she testified that she received it from an attorney, and that afterwards she delivered it to the grantor. It was held that she was incompetent to testify to the re-delivery. *Shufeldt v. Watrous*, 16 Wk. Dig. 198.

Also held, in an action against a surviving trustee and the representatives of a deceased trustee, that the plaintiff could testify to transactions had by him with the trustees where both participated, where they were not partners, but merely tenants in common. *Church v. Kidd*, 3 Hun, 254.

Also trustees or officers of religious or charitable institutions, who serve without pay, do not come within the statute. *Matter of O'Rourke*, 12 Misc. 248 ; 34 Supp. 45.

But a trustee cannot testify to conversations with the deceased as to what he should do with certain funds, which he claimed to be allowed for, as being expended under the direction of the deceased. *Welkins v. Baker*, 23 Hun, 32.

Also, in action for partition among heirs, where a mortgage given by the widow of the former owner was set up as a charge against the property by the executors of the deceased mortgagee, it was held that the executors

were incompetent to testify to conversations with one of the heirs since deceased to show knowledge of the giving of the mortgage on the part of such heir, as against the children of the latter. *Gomerich v. Ulrich*, 12 Supp. 353.

In an action upon an alleged agreement on the part of defendant's intestate, to pay plaintiff for the care and support of intestate's illegitimate child, the mother of the child is competent to testify to the contract. *Connelly v. Conner*, 117 N. Y. 91. Upon the trial of an action against an administrator, a defendant is not prohibited from giving testimony in behalf of his co-defendant concerning a personal transaction with the deceased, unless he is himself interested in the event. *Ehman v. Scheuerman*, 14 St. Rep. 705.

But the declarations of a sole administrator or executor, made when not acting in the discharge of his duties, to third persons having no interest or connection with a claim belonging to the estate, are not evidence against him, in an action brought by him in his representative capacity upon such claim. *Church v. Howard*, 79 N. Y. 415.

It has been held that hearsay evidence is admissible in the case of declarations and entries against their interest made by persons since deceased. *Swan v. Morgan*, 88 Hun, 378 ; 34 Supp. 829 ; 68 St. Rep. 768.

In an action by executors against sureties on a lease, where the defense set up is false representations of lessor inducing them to sign, the lessees cannot testify to the representations of deceased lessor made to them, and communicated to their sureties, as to the value of business done on the premises. *Hill v. Woolsey*, 42 Hun, 481.

Also held, in an action for conversion, where the defendant claimed a lien upon the property for rent under a law of another state, that she could not testify to the transaction by which the lease was made to plaintiff's grantor. *Hammond v. Schultze*, 45 N. Y. Supr. 611.

A witness is also deemed interested who will be released from liability to the plaintiff if the latter succeeds in an action against the executor. *Redfield v. Redfield*, 110 N. Y. 671 ; 18 St. Rep. 500 ; aff'd 41 Hun, 640 ; *Andrews v. Nat. Bank of N. A.*, 7 Hun, 20.

In an action to enforce a specific agreement to convey lands, where the supporting evidence was chiefly furnished by the plaintiff's mother and husband, and consisted largely of declarations of the deceased father of the plaintiff, who was one of the parties to the agreement, both parties were held to be incompetent,—the mother as a beneficiary under the agreement for a life lease, the husband as a prospective tenant by the curtesy in the title to be secured by the plaintiff. *Devinney v. Corey*, 23 St. Rep. 308 ; 5 Supp. 289 ; aff'd 127 N. Y. 655.

It has also been held that an applicant for letters of administration is incompetent as a witness to prove her marriage with deceased. *Angevine v. Angevine*, 48 Barb. 417.

Where the mere fact of a conversation between a claimant against an estate and the decedent is a material fact to be proved upon the trial, the claimant cannot testify to that fact. *Ellis v. Filon*, 85 Hun, 485 ; 33 Supp. 138 ; 66 St. Rep. 764.

Where the plaintiff was interested in the sale of a vessel by deceased, who agreed to notify him of the sale, such plaintiff cannot testify that the first he heard of

such sale was seven years after the death of the deceased, since such is an indirect attempt to prove the failure of the deceased to notify him. *Hall v. Roberts*, 63 Hun, 473 ; 45 St. Rep. 355 ; 18 Supp. 480.

Where, in order to show the relations of the parties to an action, the inventory of the estate of the husband of the plaintiff is not competent, in an action by her to recover her own money loaned to one who is her husband's committee. *Davis v. Marvine*, 11 App. Div. 440 ; 42 Supp. 322 ; 76 St. Rep. 322.

In proceedings before the surrogate of a settlement of his accounts, an executor is precluded from testifying to conversations with his testator, concerning the basis of the claim of a third person against the estate, which has been paid by the executor, and for which he is seeking to be allowed credit as against contesting residuary legatees. *Matter of Smith*, 153 N. Y. 124 ; rev'g 89 Hun, 605.

There seems to be no difference between actions or probate proceedings, as to the application of this section, to persons in a representative capacity, if they are in addition interested in the estate. *Lane v. Lane*, 95 N. Y. 494 ; *Poucher v. Scott*, 33 Hun, 495.

*Creditors* also frequently come within the rule.

Thus a creditor cannot raise the objection that the claim allowed by the executors was proved by a party in interest. *Estate of Le Baron*, 6 Civ. Pro. 62. Nor can he object to the verification of claims against decedent's estate. *Matter of Frazer*, 92 N. Y. 239.

In an action by a judgment creditor of a fraudulent grantor against the administrator of deceased mortgagee to set aside a mortgage as fraudulent, neither the fraudulent grantor nor grantee who covenanted to pay the

grantor's debts are competent to testify to the consideration of the mortgage. *Wilcox v. Dodge*, 53 Hun, 565 ; 6 Supp. 368 ; 25 St. Rep. 572 ; 27 Abb. N. C. 209 ; 17 Civ. Pro. R. 248 ; *Booth v. Wilson*, 26 St. Rep. 173.

In an action by the executors of the deceased judgment debtor against the judgment creditor, it was held that the latter could not testify as to personal transactions with the deceased. *Geissman v. Wolf*, 46 Hun, 289. But also held in an action brought by judgment creditors against the widow to set aside conveyances adjudged to be fraudulent, they could so testify, since they do not claim under him. *Gillies v. Kreuder*, 33 Hun, 314.

It has also been held that where an administrator verifies a claim of his against his intestate, that fact does not establish its validity, nor is the administrator a competent witness to the facts constituting the claim. *In re Child's Estate*, 5 Misc. 560 ; 26 Supp. 721.

But in an action by a creditor against the devisee of real estate to reach the same for debts of the testator, where the representatives of a mortgagee of such devisee are made parties, it was held that the creditor may call as a witness the devisee to show that the mortgagee did not accept the mortgage in good faith and without knowledge of the testator's debts, and such devisee was not disqualified to testify to personal transactions with such mortgagee who had died prior to the commencement of the action. *Cunningham v. Whitford*, 74 Hun, 273 ; 26 Supp. 575 ; 56 St. Rep. 285.

Where plaintiff's grantor in ejectment died before trial, and defendant by his answer claimed to be the equitable owner and asked a conveyance of the premises, the defendant is incompetent as to transactions between

himself and deceased tending to sustain his counterclaim. *Buck v. Stanton*, 51 N. Y. 624.

*Stockholder.* The words of the statute, that "a person shall not be deemed interested by reason of being a stockholder or officer in any banking corporation which is a party to the action or proceeding," seem to be intended to apply strictly to stockholders of that description.

Thus it has been held that a stockholder of a corporation cannot testify in its behalf as to personal transactions with the plaintiff's testator. *Keller v. West B. & C. Manuf'g Co.*, 39 Hun, 348. But also held that a stockholder in defendant's company, which was the grantee in a deed of land encumbered by a mortgage, is a competent witness in behalf of the mortgagor, to testify to conversations with deceased mortgagee to show payments of money. *Murray v. Fox*, 39 Hun, 108 ; aff'd. 104 N. Y. 382.

*Legatees.* All legatees or those in any way benefitted under the will of course come within the prohibitions of this section. *Lane v. Lane*, 95 N. Y. 494 ; *Matter of Smith*, 95 N. Y. 516 ; *Snyder v. Sherman*, 23 Hun, 139 ; 88 N. Y. 656. Those persons cannot testify to any such conversation or transaction which occurred in their presence at the time of the execution of the will and its publication. What occurred at that time came within the prohibition of the Code, although the witness took no actual part in the conversation, which was wholly between the testator and attesting witness. *Matter of Bernsee*, 141 N. Y. 387 ; 71 Hun, 27.

Thus in an action by an executor to recover money due the estate a legatee is considered interested in the event. *Brigham v. Gott*, 20 St. Rep. 420 ; 3 Supp. 518. Also, a legatee of the income of the estate during his life, the

principal to go to his heirs, cannot testify to any conversations with deceased which tend to diminish his legacy by proving advances made during lifetime of testator. *Benjamin v. Dimmick*, 4 Redf. 7. This section is not in opposition to section 2544, where it is declared that a person is not disqualified or excluded from testifying respecting the execution of a will from the fact that he is a legatee under it.

That section only refers to a subscribing witness to a will, and does not authorize a beneficiary thereunder to testify where his testimony would be excluded. *Matter of Eysaman*, 113 N. Y. 62; 22 St. Rep. 136; *Estate of Voorhis*, 1 How. N. S. 261.

Where the defendants, who were legatees, had made an agreement with the plaintiff's intestate, who was also a legatee, by which there was to be a division of the property other than that made by the will, sought to avoid the effect of such agreement by showing they were induced to sign through the false representations of plaintiff's intestate, each was allowed to testify to hearing such representations made in the presence of the other. *Hard v. Ashley*, 117 N. Y. 606; rev'g 53 Hun, 112. Also held, that one who is both executor and legatee is not disqualified from testifying in behalf of the executors as to personal transactions with the deceased, in an action against them. *Klock v. Brennan*, 82 Hun, 262; 63 St. Rep. 501; 31 N. Y. Supp. 190. In an action brought by an executor to recover money due the estate, a legatee is deemed to come within the definition of an interested person. *Bingham v. Gott*, 20 St. Rep. 420; 3 Supp. 518.

Neither is a legatee nor heir disqualified from so testifying in an action against an insane person, where they



have been paid their legacies and released the estate from their claims. *Brown v. Klock*, 24 St. Rep. 165 ; 1 Silv. Sup. Ct. 273.

(The position of a legatee in probate proceedings will be more fully discussed under that head.)

*Heirs and next of kin.* Heirs and next of kin are also as a rule incompetent under this section. *Holcomb v. Holcomb*, 95 N. Y. 316 ; *Riggs v. Am., etc., Soc.*, 35 Hun, 656 ; *Schoonmaker v. WOLFORD*, 20 Hun, 166. Thus a husband has been held included in the definition of next of kin, so as to preclude a party from being examined in his own behalf, as to transactions with a deceased person, as against persons who are next of kin. *Dewey v. Goodenough*, 56 Barb. 54.

But the fact that a witness upon a contested application for administration by the husband of the decedent is a second cousin of decedent, and entitled as the next of kin to participate in the estate in the event of the death of numerous first cousins, does not disqualify him. *Matter of Hanley*, 44 Hun, 559 ; 9 St. Rep. 76.

Nor is a son of decedent rendered incompetent as a witness under this section, when he is neither a party to the action nor has any present vested interest in the matter in controversy. *Hirsch v. Auer*, 146 N. Y. 13 ; 65 St. Rep. 570.

In an action brought by remaindermen against an executor and legatee of life tenant to recover property claimed by them to belong to the estate and to the remainder of which they are entitled, but which is claimed by the defendants to be part of the individual estate of the testator which passed to them under the will, the plaintiffs were held incompetent to testify to statements made by the life tenant that she had no property which

she owned absolutely. *Buchanan v. Miller*, 22 Week. Dig. 235.

But it has also been held that where this class of persons are concerned, evidence of the admission by the defendant to an agreement made by him with a deceased person, is not incompetent. *Hirsch v. Auer*, 146 N. Y. 13 ; 65 St. Rep. 570.

Thus heirs at law cannot testify to declarations in their own favor made by their father, under whom they claim. *Sherman v. Pickells*, 2 St. Rep. 160. Nor can a party claiming title through and under the deceased as heir at law, and in hostility to the deed sought to be set aside, testify to either the acts or appearance of the deceased. *Smith v. Meaghan*, 40 Hun, 401. But where an action was brought by an heir at law to set aside a deed of a deceased grantor on the ground of fraud, incompetency and undue influence, it was held that other heirs at law, not parties to the action, were not interested in the event thereof within the meaning of the statute. *Hobart v. Hobart*, 62 N. Y. 80.

§ 33. **What interest does not disqualify.** A person not a party to the action, nor interested in the event, is not rendered incompetent as a witness. Thus an executor of an estate does not come within the rule. *In re Gogan*, 20 Supp. 426 ; 21 Id. 250. Thus he is not held to be interested in a claim brought by the widow for moneys loaned by deceased for her and may testify in support thereof. *Wiltsie v. Wiltsie*, 17 St. Rep. 258. Also, where, upon a contested accounting of an executor, it was objected that he had not charged himself with certain moneys collected from an insurance company, held that one not a party thereto was competent to testify to an agreement with the testator, by

which he should be reimbursed for money advanced for payment of the premiums out of the proceeds thereof, payable upon the death of the insured. *Matter of Lewis*, 5 App. Div. 178 ; 39 Supp. 26.

Thus where an heir at law is not a party to the action brought by another heir of the deceased grantor to set aside certain deeds, he may testify to personal transactions with the deceased. *Hobart v. Hobart*, 62 N. Y. 80. Also, where the estate of the intestate is insolvent, it has been held that a son of the deceased is not disqualified from being a witness, as his interest is too remote. *Lathrop v. Hopkins*, 29 Hun, 608.

Where a wife sued to recover for services rendered by her to a third party under an agreement with her husband that the money received therefor should belong to her, it was held that she did not claim as assignee of her husband, and the latter was a competent witness in her behalf. *Lashear v. Croissant*, 88 Hun, 206 ; 34 Supp. 667 ; 68 St. Rep. 395.

Also, where a wife brings an action against an executor for services rendered to the decedent, her husband may testify in her behalf. *Burley v. Barnhard*, 9 St. Rep. 587. A husband may also testify in his wife's behalf, in regard to her real estate. *Cooper v. Monroe*, 77 Hun, 1 ; 28 Supp. 222. Thus a husband of a mortgagor who is made a party defendant in an action of foreclosure may testify in behalf of defendants. *Humphrey v. Sweeting*, 92 Hun, 447 ; 36 Supp. 967 ; 72 St. Rep. 70. Also, a husband who joined with his wife in a bond and mortgage on her property, and who makes no defense in foreclosure proceedings brought against him individually and as administrator of her estate, is not incompetent to testify in behalf of the children by reason of his being a tenant by

curtesy initiate in the lands. *Albany Sav. Bank v. McCarty*, 149 N. Y. 71 ; rev'g. 71 Hun, 227 ; 24 Supp. 991 ; 54 St. Rep. 577. Also a husband who has consented to his wife taking boarders, and receiving the compensation therefor, may testify in her behalf as to personal transactions with a deceased boarder. *Sands v. Sparling*, 82 Hun, 401 ; 63 St. Rep. 558 ; 31 Supp. 251.

It has also been held that a wife may testify in behalf of her husband in his suit against decedent's estate for services rendered by her as nurse or otherwise, to decedent. *Porter v. Dunn*, 61 Hun, 310 ; *Hopkins v. Clark*, 90 Hun, 4 ; 35 Supp. 360.

In an action against administratrix to cancel a mortgage given to the intestate, on the ground of lack of consideration, where it appeared that the property mortgaged had been conveyed by the plaintiff and her husband to a third party, who had conveyed it back, vacating the mortgage, the husband was allowed to testify in his wife's behalf. *Wilson v. Mimeoz*, 6 Civ. Pro. 71. Also, held that a husband, agent or sister to an interested party may testify to transactions with deceased in her behalf. *Savercool v. Wilsey*, 5 App. Div. 562 ; 39 Supp. 413.

A son of a party to an action does not come within the definition, when he is not a party to the action or actually interested in the event, nor is one from whom the party acquired the title. *N. Y. Smelt. & Ref. Co. v. Lieb*, 56 N. Y. Supr. 308 ; 21 St. Rep. 450 ; 4 Supp. 545 ; aff'd 121 N. Y. 674. Also, a mother who had entered into a contract with decedent in behalf of her child, by which the former was to adopt the latter and leave it his property, was held competent to give evidence as to the agreement of adoption. *Godine v. Kidd*, 29 Abb. N. C.

36 ; 19 Supp. 336. Also, a mother of a bastard child has been held competent to testify to an agreement of its deceased father, to support it, and also to conversations with decedent at the time. *Connelly v. O'Connor*, 117 N. Y. 91 ; 26 St. Rep. 840 ; 18 Civ. Pro. 8.

A father, who has surrendered in advance to his minor child her unearned wages, may testify in her favor in an action by the administrator of her employer as to the arrangements between himself and decedent in reference to such employment. *Shirley v. Bennett*, 6 Lans. 512.

The statute does not extend to a witness who is neither interested in the subject of his testimony, nor is offering it in his own behalf. *Kelsey v. Cooley*, 11 Supp. 745 ; 35 St. Rep. 775. Thus a purchaser at a sale of real estate to pay the debts of the decedent is not deemed to be within the statutory definition. *Wolfe v. Lynch*, 2 Dem. 610. A person who transferred his title to the property before the transaction took place is competent to testify to the transaction between deceased and himself. *Rockwell v. Peck*, 13 App. Div. 621 ; 43 Supp. 196 ; 77 St. Rep. 196. Nor is a witness for a donee deemed interested, from the fact that he is her brother, has a similar claim against the estate, and he stated that he had been advised by counsel that if the donee won her action he would win his. *Rix v. Hunt*, 16 App. Div. 541. A person may also testify to advancement to a third person for decedent. *Matter of Zinke*, 90 Hun, 127 ; 35 Supp. 645 ; 70 St. Rep. 509. One to whom the testator left a sum of money to be expended for the benefit of others is not an interested party. *Todd v. Vaughan*, 90 Hun, 70 ; 35 Supp. 457 ; 69 St. Rep. 861.

*Agents.* A person not a party to the action nor in-

interested in the result is not rendered incompetent from the fact that he was the agent for one of the parties, even though that party be his wife. *Whitman v. Foley*, 26 St. Rep. 133 ; *Smith v. Meaghan*, 28 Hun, 423. Also, although a party cannot testify to transactions with the deceased, he may give testimony of such a nature had with the agents of such decedent. *Pratt v. Elkins*, 80 N. Y. 198 ; *Waterhouse v. Gilman*, 6 St. Rep. 283.

On the hearing of a claim against the decedent's estate, the agent who had charge of the transaction out of which the claim arose, and who was not a party to or interested in the action or proceedings, was held competent to testify in favor of the claimant, as to conversations between himself and the decedent. *Ketcham v. Holden*, 88 Hun, 482 ; 34 Supp. 870.

Neither does the prohibition apply to transactions or conversations had with the deceased agent of the adverse party. *Hildebrant v. Crawford*, 65 N. Y. 107 ; *Platner v. Platner*, 78 Id. 90 ; *Pratt v. Elkins*, 80 Id. 198. But where an agent lends money and takes a note payable to his principal or bearer, and afterwards buys the note and dies, in an action upon it by his administrator the defendant cannot testify to personal conversations with deceased at the time the note was given, so as to prove usury. *Jackson v. McLure*, 5 Week. Dig. 448. Also, an agent may testify to transactions and conversations between his principal and deceased in favor of his principal. *Nearpass v. Gilman*, 16 Hun, 121 ; aff'd 104 N. Y. 506.

Also held, that where an agent was sued for conversion, and justified the taking under a chattel mortgage given to his principal by deceased mortgagor, he may avail himself of the restrictions of the statute to the

same extent as his principal. *Gordon v. Barney*, 43 Hun, 633 ; 6 St. Rep. 181.

§ 34. **Mortgagors and mortgagees.** A mortgagor is prohibited from giving testimony as to transactions which occurred between himself and a deceased mortgagee, which tend to contradict the mortgage, in an action of foreclosure brought by the executors of devisee of the mortgage. *Smith v. Hazard*, 4 Hun, 418. Neither can a mortgagee testify as to the non-payment of any money as principal or interest on a bond and mortgage, as against the representatives of a deceased mortgagor. *McMurray v. McMurray*, 63 Hun, 183. But a prior mortgagee may prove notice by the mortgagor to a person who takes a second mortgage on the property. *Clark v. McNeal*, 114 N. Y. 287 ; 14 St. Rep. 507.

In an action by an executor to foreclose a mortgage given to the deceased, the defense was that it was given as collateral security, and it was held on the trial that the mortgagor could not testify upon the trial that he had seen a paper signed by himself and the deceased, nor state its contents. *Hadsall v. Scott*, 26 Hun, 617. Neither can a subsequent mortgagee, also a defendant, testify to conversations with the deceased in his own behalf. *Id.*

In an action to foreclose a mortgage against joint obligors, one of two cannot testify as to the fact that the mortgage was given in payment of a gambling debt owed by him to the deceased mortgagee. *Lutchford v. Lord*, 132 N. Y. 465. Also, where the mortgagee sold a mortgage to plaintiff's decedent, it was held in an action to foreclose the same that the vendor could not testify as to conversations with decedent at the time the mortgage was given. *Smith v. Cross*, 90 N. Y. 549. Also, where

the plaintiff produced at the trial a written assignment of the mortgage, which purported to have been executed by the deceased, and testified that he knew the handwriting of the deceased, it was held improper to ask him if he saw the instrument signed. *Howell v. Mainwaring*, 3 St. Rep. 554 ; aff'd 28 Id. 982.

A husband who joins with his wife in executing a mortgage on the latter's lands, and who is made a party defendant and sought to be charged with any deficiency which may arise from the sale of the premises in an action brought by the executor of the assignee of the mortgagee, cannot testify to transactions with deceased which tend to show usury. *Whitehead v. Smith*, 14 Hun, 531 ; aff'd 81 N. Y. 151. But where a husband and wife both united in a mortgage on land owned by the former, and the former died, devising the premises to his wife, the wife was held competent to testify against the assignee of the mortgagee as to conversations and transactions between her husband and the mortgagee in relation to the mortgage. *Holcomb v. Campbell*, 118 N. Y. 46 ; 27 St. Rep. 848. In an action brought by an executor to foreclose a mortgage for \$1,000, where the defense was usury, the mortgagor was held incompetent to testify when and where the money was paid him, but his wife was allowed to testify that she was present at the time and saw deceased pay over the money to her husband, and heard the latter say, "That is just as we agreed, \$950." *Wilson v. Reynolds*, 31 Hun, 46 ; aff'd 98 N. Y. 640.

But held that a mortgagor who, after conveying the mortgaged premises, has been made defendant in foreclosure proceedings, but against whom no money judgment has been asked, and by whom no answer has been



put in, is yet incompetent to testify in favor of his grantee in regard to a personal transaction between himself and plaintiff's intestate. *Smith v. Hathorn*, 25 Hun, 159. Reversed in other points, 88 N. Y. 211.

§ 35. **Promissory notes.** As a general rule, the survivor of joint makers of a note is competent as a witness to transactions with his deceased co-maker. This rule is subject, however, to the qualification that if it is to the interest of the witness to make his co-maker liable, as well as himself, and his testimony goes to prove their joint liability, and consequently the duty of co-distribution between them, then the prohibitions of the statute apply. *Sprague v. Swift*, 28 Hun, 49; 3 Civ. Pro. 34. To render such a witness competent it must appear that the deceased maker was either a surety for the witness, or that as between themselves each was not liable to contribute to the payment of the note. *Wilcox v. Corwin*, 117 N. Y. 500; rev'g 50 Hun, 425.

This distinction must be ever borne in mind in the examinations of the various decisions upon this point.

In an action upon a promissory note against the personal representatives of decedent, plaintiff's testimony as to why he borrowed money from the deceased instead of asking payments on the note is not rendered admissible by the production of testimony given by the deceased on another action, and which did not refer to the loan. *Ward v. Holmes*, 19 Wk. Dig. 121.

Where a promissory note executed by a deceased person is read in evidence by those who represent him, the living party to the document cannot testify to whatever was said and done when it was executed. *Matter of Callister*, 153 N. Y. 294.

In an action on a joint and several note, one maker

can prove an usurious agreement with the deceased payee, whose executrix is the plaintiff, if the testimony is offered only on behalf of the co-maker. *Ely v. Clute*, 19 Hun, 35. But in an action upon a note made by the defendant and payable to his wife, since deceased, or bearer, and which came into the hands of a third party, he cannot prove that the note was without consideration. *Benedict v. Driggs*, 34 Hun, 94.

But the alleged maker of a note is competent to testify, in an action by an indorser, that the name signed to the note is not his signature, although the payee is dead. *Saratoga Co. Bank v. Leach*, 37 Hun, 336. Also, where the note was indorsed by the payee for the maker's accommodation, the holder does not derive title within the section, so that, in an action against indorser's executor, the maker is not disqualified from testifying to admissions made by the testator which tend to charge him. *Converse v. Cook*, 31 Hun, 417; *N. Y. Nat. Bank v. Jones*, 9 Daly, 248.

But in actions by personal representatives of a deceased person, upon a promissory note against maker and indorser, neither of them can be a witness in favor of the other as to transactions with the deceased, although they have put in different answers. *Alexander v. Dutcher*, 7 Hun, 439; aff'd 70 N. Y. 385.

In an action against the maker of a note, evidence of statements made to him by an intermediate transferee since deceased, tending to establish a defense of payment, is inadmissible. *German Savings Bank v. Slade*, 15 Misc. 287; 36 Supp. 983; 72 St. Rep. 427. But where an administrator, before the death of the intestate, transferred to a third person a note purporting to have been made by intestate, and subsequently as administrator paid the

same, and its validity is questioned by one interested in the estate, the third person to whom the note was delivered can give testimony tending to show that the note was executed and delivered for a good consideration. *Matter of McNeany*, 5 App. Div. 456 ; 38 Supp. 1093.

In an action brought by an administrator of the payee against the maker and surety, where the surety alone defended the action, the court held both that the maker was incompetent to testify as to any transaction with the intestate, and that the surety could not, in his own behalf, testify whether he had any interest in the note or had received any benefit from it. It was also held that the error in admitting the maker's testimony was not cured by the fact that the plaintiff afterwards testified to the same matters. *Church v. Howard*, 79 N. Y. 415 ; rev'g 17 Hun, 5.

But where the surety alone appealed from the judgment, it was held that the maker was a competent witness in his favor, since the amount of his liability had been fixed by the judgment. *Bradner v. Howard*, 14 Hun, 420.

It has also been held that where judgment has been rendered against two joint makers of a note, and only the accommodation signer appeals, the former is a competent witness for the latter as to transactions with a deceased person. *Allis v. Stafford*, 14 Hun, 418. But see *Wilkins v. Baker*, 24 Id. 32.

In an action against partners on their promissory note, where only one answered, on a new trial when the non-answering maker has died, his direct evidence on the former trial was read. The plaintiff then put in evidence his cross-examination regarding certain transactions with the defendant. It was held that the latter

was competent as a witness in his own behalf touching these matters. *Potts v. Moyer*, 86 N. Y. 302 ; rev'g 46 Supr. 182.

Where the defendant was sued on his joint note, of which he was an accommodation maker, and before trial the payee died, it was held that the co-maker could not testify to transactions with the deceased. *Allis v. Stafford*, 13 Week. Dig. 522. Also, where the payee dies before the action brought by the indorsee for value before maturity, and the answer denies that the plaintiff is a holder for value, the defendant cannot testify to conversations with the deceased payee in reference to the note. *McMillan v. Sterne*, 8 Misc. 82 ; 58 St. Rep. 829. Also, where the action is upon a note made by one of the defendants and indorsed by the others to the intestate, the defendant cannot show either usury or that the time of payment had been extended by agreement between the witness and the testator, without the knowledge of the indorsers. *Genet v. Sawyer*, 61 Barb. 211 ; *Fox v. Clark*, Id. 216.

But a plaintiff can testify that certain notes in suit were in her possession prior to the maker's death, and were in holder's possession at the time of such death. *Mortimer v. Chambers*, 63 Hun, 335. Also, in an action upon a note given to plaintiff's intestate, where the defense was that it had been assigned to defendant's wife, the defendant can testify that he saw the note in his wife's possession. *Smith v. Sergeant*, 2 Hun, 107. But a plaintiff cannot testify to its non-payment, where the defense of payment is set up. *Howell v. Van Sielen*, 6 Hun, 115.

Also, in an action against an executor, upon a note made by the testator, which was barred unless interest

was paid as indorsed, the plaintiff is incompetent to testify as to the indorsements. *Redfield v. Stett*, 4 St. Rep. 864. But where the action is brought by a second indorser, who has taken up the note and paid it, against the first indorser to recover the amount thereof, he is not precluded by the death of the maker from testifying to the circumstances of the indorsements. *Kelly v. Burroughs*, 102 N. Y. 93 ; aff'g 33 Hun, 349.

Also, one to whom a note is pledged by the payee is a competent witness after the redemption of the note, in payee's action against the maker's representatives. *Wilson v. Low*, 7 St. Rep. 672. Also, where the note was indorsed by the payee for the maker's accommodation, the holder is competent to testify to admissions of testator tending to charge him, in an action against the indorser's executors. *Converse v. Cook*, 31 Hun, 417.

But where the issue is, that the note was indorsed at the request of the deceased for a special purpose, and afterwards diverted by such deceased person, the indorser cannot testify as to the personal request of deceased. *Sallade v. Gerlach*, 132 N. Y. 548 ; 4 Silv. Ct. App. 74. But indorsers not a party to the action, and who have not been charged on a note in a suit brought against the maker, are competent to prove conversations with deceased owner to defendant showing payment. *Nearpass v. Gilman*, 104 N. Y. 506. So also may an agent of deceased who signed the note in his own name be competent. *Id.*

But a plaintiff in an action against an executrix cannot testify as to notes made by deceased to the order of, and indorsed by, plaintiff, when the transaction had was personal between them. *Strong v. Dean*, 55 Barb. 337.

In an action upon a promissory note, where the defend-

ant interposed a counterclaim for rent due from the plaintiff's intestate, he was held incompetent to answer whether he had ever received any money from the intestate or any one representing him. *Baldwin v. Smidt*, 5 Hun, 454.

Neither can a defendant testify as to the consideration, in an action upon a bond, by the administrator of the obligee. *Stanley v. Van Alstyne*, 28 N. Y. 375.

It has also been held upon a reference of a disputed claim by an executor against the estate of deceased person founded upon a promissory note, where the defendant set up the statute of limitations, that the plaintiff and other witnesses who were beneficiaries under the will to a third of the amount collected, were incompetent to testify that the indorsements on the note were made by the plaintiff during the lifetime of plaintiff's testator. *Mills v. Davis*, 113 N. Y. 243; 22 St. Rep. 580; rev'g 41 Hun, 415. But where the contestants of an account examine an executor as to personal transactions with the testator, and establish such executor's personal liability on the note in question, the executor may testify concerning the entire transaction in order to relieve himself of such liability. *In re Beach Estate*, 1 Misc. 27; 22 Supp. 1079.

But in an action upon a firm note against the executor of the deceased member of the firm, a surviving partner cannot testify to any transactions with the deceased which tend to show that the latter was a member of the firm. *Hunter v. Herrick*, 26 Hun, 272; aff'd 92 N. Y. 626. A transferee of a note has been held to be an assignee within the definition of the section. *Richardson v. Warner*, 13 Hun, 13. But in an action by an accommodation indorser of a note, to recover the amount paid

by him from the defendants, to whom it had been transferred in violation of the terms of the indorsement, it was held that the defendants were not assignees within the section. *Comstock v. Hier*, 73 N. Y. 269.

A donee has also been held to be an assignee. *Howell v. Taylor*, 11 Hun, 214; *Cornell v. Cornell*, 12 Id. 312. But a donee of a power, with compensation for services and care, has been held not to be disqualified as a witness under this section. *Matter of Chase*, 41 Hun, 203; 4 St. Rep. 195.

It has also been held, in an action brought against the maker of a note, that evidence of statements which were made to him by an intermediate transferee since deceased tending to establish a defense of payment are inadmissible. *German-Am. Bank v. Slade*, 15 Misc. 287; 36 Supp. 983.

In an action against executors upon notes alleged to have been made by the testator, and defendant had testified that the signatures were not genuine, the plaintiff was held incompetent to testify that he received the notes from the testatrix. *DeVerry v. Schuyler*, 8 Supp. 221; 28 St. Rep. 233.

Also held, that where the holder of a promissory note parts with its possession to the maker, it is a personal transaction within the meaning of the statute. *Van Gilder v. Van Gilder*, 81 N. Y. 625.

In an action brought by an executor for the alleged conversion of certain notes, and plaintiff had testified that such notes were kept by the deceased prior to her death in a trunk in her room, where he saw them the morning before she died, but could not find them afterwards, and also showed that the defendant was in the room during the last hours of deceased. The notes were

afterwards found in the defendant's possession, who claimed them as a gift from the deceased. He was permitted to answer the question, "Did you take these notes from any trunk or person?" *Lewis v. Merritt*, 98 N. Y. 206.

§ 36. **Partnerships.** The term "survivor," as used in this section, is held to cover the surviving partner of a firm, and thus includes him within the statute. *Green v. Edick*, 56 N. Y. 613; *Kale v. Elliott*, 18 How. Pr. 198; *Conway v. Moulton*, 6 Id. 650; *Farley v. Norton*, 67 Id. 438; *Pettit v. Geesler*, 58 Id. 195. The doctrine that a surviving partner may claim the protection of this section, as to conversations or transactions with his deceased partner, has been extended in favor of one who is not in fact a partner, but has held himself out as such, and was so alleged in the complaint. *Farley v. Norton* 57 How. Pr. 438.

Thus in an action by the survivor of an alleged partnership against the personal representatives of a deceased partner, the plaintiff can neither prove the partnership nor testify as to who received the receipts of the office and paid the expenses, and carried on the business, nor that at the time of the formation of the alleged partnership the deceased made an entry in his presence in the firm book, for the purpose of establishing the commencement of the partnership at that time. *Adams v. Morrison*, 113 N. Y. 152; 22 St. Rep. 324.

Also held, in an action against the executors of a deceased partner upon an unpaid judgment rendered upon the firm's note, that the surviving partner could not testify in favor of the plaintiff as to personal transactions with the deceased tending to prove that he was a member of the firm. *Hunter v. Herrick*, 26 Hun, 272.



Also, in an action between the personal representatives of deceased partners for a settlement, evidence by the plaintiff as to actions of her husband and intestate which had taken place when they were alone together, tending to show insanity, was held incompetent. *Mason v. Mason*, 23 Wk. Dig. 411.

Nor in an action against the surviving member of a firm can the plaintiff testify to conversations held by him with the deceased partner. *Green v. Edick*, 56 N. Y. 613. Neither can the defendant testify to conversations with a deceased partner, the plaintiff being the survivor. *Manning v. Schmidt*, 4 App. Div. 131; 38 Supp. 640; 74 St. Rep. 505. But this rule does not protect the surviving partner unless he was absent at the time in question, for if he was present when the alleged conversation occurred, then the witness may testify to anything which took place in his presence. *Kale v. Elliott*, 18 Hun, 198. See, also, 73 N. Y. 269.

In an action against a surviving partner, a general question is inadmissible which has the effect of allowing the plaintiff to testify to transactions with the deceased partner. *Bristol v. Sears*, 3 Civ. Pro. 328. Neither can the defendant in an action brought against him by the surviving partner for money loaned to him by the firm testify to an agreement with the deceased partner under which he received the money. *Corning v. Walker*, 100 N. Y. 547; aff'd 28 Hun, 435.

The fact that the plaintiff, a surviving partner, testified to negotiations in regard to the contract in suit, between himself and the defendant, which contract was completed by his deceased partner, does not render the defendant competent to testify as to the final negotia-

tions between himself and deceased. *Goodwin v. Hirsch*, 37 N. Y. Supr. 503.

Where the plaintiff had assigned a mortgage to defendant's firm to secure a brother's indebtedness, in an action to compel a re-assignment, it was claimed to have been agreed that upon the payment of a specified amount the mortgage should be assigned. It was held that the brother was incompetent to testify to an agreement made by him with defendant's deceased partner as to the terms upon which the mortgage was to be assigned. *Lawton v. Sayles*, 40 Hun, 252.

In an action to establish a partnership between plaintiff's intestate and the defendants, and the title of the plaintiff's intestate in the co-partnership funds, it was held that the defendant was disqualified from testifying in regard to personal transactions which occurred between him and a deceased person from whom the plaintiff's intestate to some extent derived title. *Sheldon v. Sheldon*, 84 Hun, 422 ; 32 Supp. 419 ; 65 St. Rep. 693.

In an action against a surviving partner to recover back money paid for goods which were not as represented, the plaintiff is not competent to testify that the purchase was made in reliance on representations made to her by the deceased partner. *Meril v. Brunner*, 9 St. Rep. 47.

It has also been held that a question as to whether plaintiff's intestate was a creditor of defendant's firm at a certain time involves a personal transaction. *Wheeler v. Kuntz*, 9 St. Rep. 496. Also held, that the testimony of the survivor of a firm must be excluded, when it is in effect a disclosure of what has occurred between the witness and the deceased in relation to the matter at issue. *Nay v. Curley*, 113 N. Y. 575 ; 23 St. Rep. 496.

In an action for goods sold and delivered, where the defense is payment, the plaintiff being the surviving member of the firm, the defendant cannot testify over plaintiff's objections that he paid the bill in question to deceased partner. *Petit v. Geesler*, 58 How. Pr. 195.

§ 37. **Personal transactions.** The words "personal transactions and communications," used in the statute, are defined as embracing every variety of affairs which can form the subject of negotiations, interviews or actions between two persons, and includes every method by which one person can derive impressions or information from the conduct, condition or language of another. *Heyne v. Doerfler*, 124 N. Y. 505 ; 36 St. Rep. 497 ; rev'g 32 St. Rep. 960.

To such an extent is this rule carried, that it has been held incompetent to show the silence of the deceased on a particular occasion, if such silence can be construed to signify assent. *Fox v. Clark*, 61 Barb. 216 ; *Oliver v. Freleigh*, 36 Hun, 633.

Although it must appear that such transactions and communications are personal, in order to invoke the rule, yet it is not requisite that they were private or confined to the deceased and witness. *Heyne v. Doerfler*, 124 N. Y. 505 ; 36 St. Rep. 497.

Thus when the plaintiff presented a bill against an estate for board of the nephew and niece of the deceased, it was held that she could not be asked if she had a conversation with decedent about the nephew and niece coming to her house. *Id.*

The word "transactions" does not embrace all the occurrences which go to make up a cause of action, but only such as must have been communicated to the de-

ceased person to give them effect. *Franklin v. Pinkey*, 18 Abb. Pr. 186 ; rev'd on another point, 2 Robt. 429.

Thus, upon an application to revoke a will on the ground that the testator was under eighteen years of age, the mother may testify as to his birth, birth being held not to be a transaction within the meaning of the statute. *Matter of Paige*, 62 Barb. 476.

It has also been held that this section does not extend to occurrences at which the deceased need not have been present. *Francklin v. Pinkey*, 18 Abb. Pr. 186.

Thus the plaintiff was allowed to testify that he deposited the money sued for to the credit of the decedent in the bank account of the latter under a certain custom or arrangement by which he kept his funds in the decedent's hands in this way. *Id.* It was also held that a child who had been emancipated did not derive title to earnings through the father in such a sense as to bring it within the statute. *Shirley v. Bennett*, 6 Lans. 512.

There is nothing in the rule which allows the admission of this prohibited evidence, from the fact that, at the time it is offered, there is some person alive who heard it and contradicted it. The transaction alone determines its competency. *Hatch v. Peugeot*, 64 Barb. 189 ; *Howell v. Taylor*, 11 Hun, 214.

The following examples of the decisions on the vexed question of what transactions are, and are not, within the definition of the statute, will show how much the determination of the question depends upon the circumstances surrounding each case.

Thus it has been held that a person disqualified to testify as to a transaction may yet state the names of the persons who were in the room with decedent and

witness at the time, although one of them has since died. *Greer v. Greer*, 58 Hun, 251.

Also, testimony of a plaintiff as to the time when he learned that the decedent had paid less, as surety, than had been given to indemnify him, is competent. *Ketcham v. Holden*, 88 Hun, 482 ; 34 Supp. 870 ; 68 St. Rep. 807. Nor is a claimant against decedent's estate prohibited from testifying to advancements of his own money to third persons in payment of bills against the decedent. *Matter of Zinke*, 90 Hun, 127 ; 35 Supp. 645 ; 70 St. Rep. 509.

Where a physician and nurse both had claims against an estate for services rendered to the decedent, the physician was held competent to testify to personal transactions with the deceased in behalf of the nurse. *Re Queen's Est.*, 13 Supp. 705. But a physician cannot prove his own attendance upon the deceased in support of his claim for compensation for services, in an action brought against an administrator. *Ross v. Ross*, 6 Hun, 182.

Also, in a reference of a disputed claim against an estate for damages incurred in defending title to land, it was held that the plaintiff was incompetent to testify to the fact that the proper notices to the deceased grantor to defend the action were taken by him to the latter's house, and that he came away without them. *Fenton v. Eggleston*, 40 St. Rep. 936 ; 16 Supp. 721. Nor can a claimant testify that figures denoting the price and number of certain cords of wood in suit were entered in a book of deceased by his son at his request, and that they agreed with the figures in claimant's book, nor can he put his own book in evidence. *Harrington v. Winn*, 38 St. Rep. 83 ; 14 Supp. 612 ; 20 Civ. Pro. 326. But it has also been held that where a notice to produce books has been

given and the books are proven to be lost, the plaintiff may testify to an entry which he saw in decedent's book during his lifetime, and that it was in the handwriting of the deceased. *Carroll v. Davis*, 9 Abb. N. C. 60.

Where the transaction was with a deceased person, the assignor of the disputed claim may be asked as a witness for the claimant if she knew whether her husband ever had a written acknowledgment of any indebtedness to him from the deceased. *Blass v. Morrison*, 47 Hun, 218 ; 14 St. Rep. 379.

The title to a cause of action by gift from a person since deceased cannot be established by mere proof of declarations of deceased imparting a gift, neither can such delivery be inferred from the testimony of the donee. *Johnson v. Spies*, 5 Hun, 468. But a grantor whose title is in dispute may testify the length of time he has occupied the property, that he has rented it and collected the rents. *Strough v. Wilder*, 49 Hun, 409.

In an action brought by the heirs of a deceased grantor to set aside his conveyance on the ground of undue influence, his widow, who joined in the instrument, is incompetent to testify as to personal transactions between herself and the deceased. *Sanford v. Ellithorp*, 95 N. Y. 48.

Also held, in a replevin suit brought against one claiming title as administratrix, that the plaintiff could not testify that the property was a gift from defendant's intestate. *Crane v. Crane*, 5 St. Rep. 423. Neither can a widow from whom an executor claims property in her hands testify that her husband gave her the property a few days before his death. *Tilton v. Ormsby*, 70 N. Y. 609; aff'g 10 Hun, 7. But when a hostile witness testifies, that after the death of the donor he heard the donee say

she never had the notes claimed as a gift in her possession, and had never received any interest on them as hers, the donee is entitled to deny this statement, and her further statement, that at the time of the interview the notes were in her trunk, is competent. *Rix v. Hunt*, 16 App. Div. 541. Where a widow sued a warehouseman for a piano she had deposited with him as her own, but which he had surrendered up to her husband's executors, it was held she could not testify to those transactions between herself and husband, which showed it was a gift, since the warehouseman came within the section. *Mullins v. Chickering*, 110 N. Y. 513; 18 St. Rep. 606.

In an action by executors to recover securities from one who claimed them as a gift *causa mortis*, it was held that the plaintiff could not prove by himself and a residuary legatee conversations between themselves and testator disproving the gift. *Cornell v. Cornell*, 12 Hun, 312.

But a wife is also incompetent to testify to a *donatis causa mortis* by her husband. *Conklin v. Conklin*, 20 Hun, 278.

Also held, in an action by executors to recover property from those who claim to hold it as a gift from deceased, that his declarations, inconsistent with the gift, were incompetent. *Graves v. King*, 15 Hun, 367.

Also held incompetent to allow evidence of the plaintiff that certain clothing and money given to him by defendant's intestate were on account of wages due him, even though this occurred on the re-direct examination, and after he had been asked on his cross-examination if he had not received them. *Vanderveer v. Vanderveer*, 19 St. Rep. 1002.

But it has also been held that testimony given by a witness upon his re-examination as to personal transactions with the decedent is not objectionable, where he has been questioned by the counsel for the administrator on cross-examination as to the same subject. *Blankman v. McQueen*, 37 St. Rep. 601.

In an action against an administrator it was held error to allow testimony of the plaintiff that a receipt put in evidence by the defendant to show payment had been changed since the plaintiff delivered it to defendant's intestate. *Boughton v. Bogardus*, 35 Hun, 198; 7 Civ. Pro. 252.

But where the executor is sued in his individual capacity, upon a claim which grew out of matters connected with the estate, in which he had acted for the estate, it was held that the plaintiff was competent to testify as to personal transactions with the deceased. *Hall v. Richardson*, 22 Hun, 444; aff'd 89 N. Y. 636.

Where an agreement between the plaintiff and defendant's decedent contains mutual covenants for an accounting, the plaintiff cannot testify to the execution and delivery of the instrument. *Choffe v. Goddard*, 42 Hun, 147; 3 St. Rep. 386.

In an action to avoid a deed as to a portion of certain premises, it was held that the defendant could not be asked whether he had stated that if the deed included a certain portion he would correct the mistake of the deceased grantor. *Mills v. Mills*, 8 Supp. 811.

In an action for money had and received by the defendant's intestate, where the defense was that the money was so placed in decedent's possession for the purpose of defrauding plaintiff's creditors, the plaintiff cannot testify in his own behalf as to whether he put



any property in the hands of the deceased for the purpose charged. *Tooley v. Bacon*, 70 N. Y. 34. See, also, *Hard v. Ashley*, 117 N. Y. 606 ; rev'g 53 Hun, 112.

But evidence of an admission by defendant as to an agreement made by him with the deceased is not incompetent. *Hirsch v. Auer*, 146 N. Y. 13 ; 65 St. Rep. 570.

Where the defendant has been handed money by another since deceased, who had received the same in trust for the plaintiff, which fact was known to the defendant, and suit was brought against him for refusal to hand it over, he claiming it belonged to him, and had been handed him by deceased, held he could not testify to transactions relating thereto, with the deceased. *Mason v. Prendergast*, 120 N. Y. 536 ; 31 St. Rep. 497 ; aff'g 12 Id. 869.

But where the action is against a corporation, a party may testify to transactions with a deceased person whose administrators have indemnified the defendant. *Severn v. Nat. State Bank*, 18 Hun, 228. Also where a corporation is a defendant the plaintiff can testify to transactions with the president since deceased, it not appearing that he is pecuniarily interested in the action. *Hunt v. P. & S. S. Co.*, 9 Civ. Pro. 291.

Where the plaintiff derived his title to a check from the party to whom the defendant delivered it and who died before the trial, it was held that the defendant could not testify to a transaction between himself and the deceased. *Raubitschek v. Blank*, 80 N. Y. 478 ; aff'g 44 Supr. 564.

Also held, that when the mere fact that a party has had a conversation with a deceased person, to whom the opposite party stands in the relation specified in the section, is a material question, it is not competent for such

party to testify that he had the conversation. *Maverick v. Marvel*, 90 N. Y. 656.

But in an action against a devisee to recover the plaintiff's share of profits according to an agreement between plaintiff and the testator, it was held that the plaintiff was competent to testify that a certain letter that he found in the testator's desk was in the handwriting of the deceased, and that it was inclosed in an envelope directed to him in testator's handwriting. *Wing v. Bliss*, 28 St. Rep. 198 ; 8 Supp. 500. But letters between a deceased person and one claiming under him as to a claim which was the subject of litigation are incompetent. *Van Vechten v. Van Vechten*, 65 Hun, 215.

Where an action was brought to recover certain personal property belonging to the plaintiff's intestate, and the defense alleged a gift from intestate of certain specified notes, the proceeds of which were divided between deceased and the defendant, the defendant was held incompetent to testify to the transaction. *Waver v. Waver*, 15 Hun, 277.

A subscribing witness to a will or codicil, who has been appointed a trustee thereunder by a surrogate's court, is not incompetent to testify to such matters. *Bostwick v. Gray*, 1 Silv. Sup. Ct. 235 ; *Matter of Palmer*, 23 St. Rep. 440.

When the principal question in controversy was whether a certain transfer of property from the deceased to the plaintiff was fraudulent and void, title to which was claimed through a sale thereof under execution against deceased, it was held that evidence as to personal transactions therein between plaintiff and deceased was incompetent. *Taylor v. Meldrum*, 6 Civ. Pro. 235.

It has also been held that interested parties cannot

testify to the physical condition of the deceased during a certain period, when the question calls for facts learned while witness and deceased were associated in business. *Scott v. Scott*, 13 St. Rep. 202.

Thus held also, that the fact that the deceased suffered from paralysis at certain material time, could not be shown by an interested witness. *Campbell v. Hubbard*, 38 Hun, 306.

Neither can such a person testify to the appearance of the testator as indicating his incompetency to make a will. *Re McArthur's Will*, 12 Supp. 823. Also one who would become invested with an inchoate right of dower in lands of decedent should the will be declared void, is disqualified from testifying as to the mental and physical condition of decedent. *Matter of Hewitt*, 21 Wk. Dig. 296. Thus the sons of the deceased were held incompetent to testify that their father was subject to spasms or fits, or to his appearance the day the assignment at issue was executed. *Holcomb v. Holcomb*, 95 N. Y. 316. Nor to his powers of memory, habits, mental and physical condition. *Id.*

A devisee is also prohibited from testifying to such matters in relation with deceased, during the last few weeks of his life. *Matter of Eysaman*, 113 N. Y. 22; 22 St. Rep. 136.

But where the administrator was called as a witness by the plaintiff and examined as to the transactions in question, his own counsel may cross-examine him as to the physical condition of the deceased at that time, as it is material upon the point whether the transaction took place; but the giving of such testimony does not thereby permit the plaintiff to testify to such facts. *Herrington v. Winne*, 38 St. Rep. 83; 14 Supp. 612; 20 Civ. Pro. 326.

An executor upon his accounting cannot testify as to the payment of money by him to the testator where he seeks credit for such amount. *Matter of Kellogg*, 104 N. Y. 648 ; 5 St. Rep. 668. But a person who presents a claim against an estate, based upon a contract with the deceased, has been held a competent witness to the contract upon an accounting. *Matter of Frazer*, 92 N. Y. 239. See *Stephens v. Cornell*, 32 Hun, 414. Also held that the fact that all the parties are dead, and the action is between their representatives, does not render such testimony incompetent. *Hurlburt v. Hurlburt*, 18 St. Rep. 407.

But in an action for trespass *quære clausum* for cutting trees, the testimony of a party in his own behalf that the deceased, while the witness was cutting the trees in the *locus in quo*, knew of that fact and came there, is incompetent. *Oliver v. Freligh*, 36 Hun, 633.

On the other hand it was held, in an action upon a life insurance policy, that proofs of loss may be made by a party interested, although they relate to personal transactions with the deceased. *Cannon v. Northwest Mut. L. Ins.Co.*, 29 Hun, 470.

In an action to recover a loan which the plaintiff claimed was made by a check given to him by the defendant's intestate, where the defendant alleged that the check was given in business of a corporation of which he was the president, it was held that a general denial in the answer authorized the defendant to show the facts in regard to the transactions. *Koehler v. Adler*, 91 N. Y. 657.

In an action by the assignee of the executor of a deceased lessee to compel specific performance of a covenant to renew the lease, the defendant was held incom-

petent to testify to any transactions or communications with deceased lessee in relation thereto. *Kolasky v. Michels*, 11 St. Rep. 354.

When testator's widow has acted as his amanuensis, a letter which was written by her to the contestant at the dictation of her husband was held to be admissible. *Matter of Budlong*, 54 Hun, 131. But a party cannot testify that he saw the deceased sign the affidavit of verification to the complaint, when the object is to prove certain admissions of the original plaintiff. *Denham v. Jayne*, 3 Hun, 614. Also in an action brought by administrators of persons addressed, against the writers of certain letters, it was held that the defendant was not competent to prove that letters were written or were received and retained by the persons addressed. *Res-seguie v. Mason*, 58 Barb. 89.

Where the plaintiff claimed as assignee of the deceased, and gave in evidence letters of his own to the defendant, which among other things contained statements of the deceased in regard to the controversy out of which the action arose, it was held that the introduction of the letters did not remove the bar of the statute, and it was error to admit testimony as to personal transactions with the deceased about the matters contained in the letters. *Farrell v. Krum*, 17 Wk. Dig. 471.

Where the transaction is with a defendant who is alive, evidence thereof is not rendered incompetent because the other defendant is dead. *Comnis v. Hetfield*, 80 N. Y. 261 ; aff'g 12 Hun, 375. Also that the death of one of the defendants, before the plaintiff's examination is completed does not justify the striking out of the latter's testimony already admitted as to transactions with him. *Id.*

In an action by a son against his stepfather to recover money he sent his mother, while she was living, to keep for him, it was held that the stepfather took the money as executor of his wife, and that therefore the son could not testify to the agreement with the mother to keep it for him. *Mosner v. Rawlin*, 66 Barb. 213. Also, where the plaintiffs had delivered money to their mother for certain purposes, which she agreed should be returned to them at her death after payment of her funeral expenses, and the mother subsequently became insane and the money found on her turned over to the defendants, it was held that the sons could not testify against the defendants to the transaction with their mother. *Peters v. Peters*, 3 Misc. 264. Neither can the plaintiff in an action for conversion of money belonging to the intestate testify that intestate's debtor paid the money to intestate in his presence. *Crawford v. Haines*, 44 Hun, 597; 8 St. Rep. 716.

But where the land purchased by the plaintiffs had been taken in the name of the father, under an oral agreement with him to devise it to them on his death, which was done, but the will was lost or destroyed, and two sisters, heirs of the decedent, had conveyed their interests to the plaintiffs; in an action against a third heir the sisters were held competent to testify to the facts of the agreement. *Kommisky v. Kommisky*, 2 Misc. 138; 20 Supp. 611.

Where a brother and sister, in support of their action in ejectment against those claiming under a deceased brother, moved to set aside the latter's naturalization, it was held that as this section did not apply to matters contained in affidavits submitted on a motion, and that it appeared that said section might be successfully inter-

posed to defeat an action to set aside the order attacked, the motion should be denied, and the parties relegated to a proper action where the question could be determined on competent evidence. *Matter of McKenna*, 31 Abb. N. C. 416.

§ 38. **Claims against an estate.** The claims which may be presented against an estate should be scrutinized with more than ordinary care, in order to prevent, as far as possible, the allowance of unjust or fictitious demands against parties whose mouths are sealed by death. *Rix v. Hunt*, 16 App. Div. 541.

*Claims for services.* The plaintiff in an action against an estate for services rendered to the decedent during his lifetime cannot testify in his own behalf to a conversation and interview with the deceased in regard to such services, even though he omit his own personal share in the conversation. *Ross v. Harden*, 42 Supr. 427. Thus in an action against an estate for work, labor and goods sold, the plaintiff was held incompetent to testify in his own behalf as to what was said by him in an attempted settlement of the claim, although the defendants were present at the time. *Davis v. Gallagher*, 124 N. Y. 487.

Upon a claim by an executor for services rendered to the testatrix, he cannot testify to transactions or communications with the deceased, nor to what he did, tending to show an implied agreement to pay for his services. *Burnett v. Noble*, 5 Redf. 69. Also in an action against an executor, where a claim for services rendered to the defendant's testator was set up as a counterclaim, it was held that the plaintiff could not be asked, "Was it true that it all had been paid?" *Williams v. Davis*, 7 Civ. Pro. 282. Neither in an action for board and

services are the declarations of the intestate competent. *Underhill v. Nichols*, 8 Week. Dig. 276.

Neither can a physician testify as to whether he treated the deceased professionally within six years preceding his death. *Ross v. Ross*, 6 Hun, 182.

But where both the physician and nurse have claim against an estate for services, the former is competent to testify to personal transactions with the decedent, in behalf of the nurse. *Re Queen's Estate*, 13 Supp. 705.

Where the plaintiff sued upon a *quantum meruit* to recover for services rendered to decedent, it was held that she could not testify that after a paralytic stroke the deceased was very feeble, or that a customary attendant was absent for a considerable period. *Campbell v. Hubbard*, 38 Hun, 306.

It was held that a person who was in default in paying the first instalment due for work under a contract was not incompetent to testify to an agreement made between the defendant's testator and plaintiff to pay the latter for completing the work. *Kitchen v. Taylor*, 14 St. Rep. 398.

In an action for legal services rendered to the deceased, where the employment was disputed, it was held that he could not give evidence of the advice given by him as to the subject-matter of his employment. *Braque v. Lord*, 67 N. Y. 495 ; rev'g 41 Supr. 193 ; 2 Abb. N. C. 1. Also, in such an action, the plaintiff cannot be asked whether "about the time you were introduced to deceased did you commence any action for him ?" *Freeman v. Lawrence*, 43 Supr. 288. Neither can an attorney testify as to what his services were, nor their value. *Sommerville v. Crook*, 9 Hun, 664 ; *Lerche v. Brasher*, 37 Hun, 385 ;



8 Civ. Pro. 115 ; reversed on other grounds, 104 N. Y. 157.

But held in an action for conversion of jewelry by defendant's testator, that the plaintiff could testify to their value. *Gregory v. Fichtner*, 21 Civ. Pro. 1 ; 14 Supp. 891. Also, that a party could testify to value of services rendered by him to deceased, in an action to recover for the same against the personal representative. *Burrows v. Butler*, 38 Hun, 157. But where the valuation of the services relates to personal transactions with the deceased, then it is incompetent. *Brague v. Lord*, 67 N. Y. 495 ; *Matter of Simpson*, 24 St. Rep. 685. Also held, that the plaintiff cannot state the length of time he worked on the testator's premises nor the value of his services. *Fisher v. Verplank*, 17 Hun, 150. Nor can one testify to the nature of the services claimed for. *Taylor v. Welsh*, 92 Hun, 272 ; 36 Supp. 952 ; 72 St. Rep. 316.

In an action against an administrator for board furnished deceased, where the defense was that the deceased paid for the household supplies in lieu of board, the plaintiff testified that she paid for the supplies herself. It was held that if by this testimony it was meant that she paid for them personally, and that all transactions were between her and tradesmen, and not between her and deceased, it was not obnoxious to the section. *Sage v. Dorr*, 21 St. Rep. 635 ; 4 Supp. 568.

In an action against railroad contractors for services, the plaintiff testified that he had a diagram of the bridge which was at issue, which was furnished him by one of the defendants, and which he had used. He could not say whether he received it from the deceased or living defendant. It was held competent in evidence, since

it did not appear that it did come from the deceased. *Comins v. Hetfield*, 80 N. Y. 261 ; aff'g 12 Hun, 375.

Where a son claims for services against his father's estate, evidence of what he did apart from personal transactions held competent. *In re Merchants' Est.*, 6 Supp. 875. Also in a similar case, a sister of the plaintiff, who was a legatee, was held competent to testify that deceased had employed plaintiff and promised to pay wages for the services. *Pursell v. Fry*, 19 Hun, 595 ; 58 How. 317.

Where a claim was made for services rendered to deceased by the plaintiff, and it was shown that she performed the same in behalf of her husband and made no claim for them herself, it was held that she could testify to the contract therefor made with deceased. *Porter v. Dunn*, 131 N. Y. 314 ; 40 St. Rep. 776 ; rev'g 61 Hun, 300.

Also held, that a husband does not claim title through, or under, his wife, but by common-law right. *Hopkins v. Clark*, 90 Hun, 4 ; 35 Supp. 360 ; 69 St. Rep. 849.

Where the claim was for services rendered to deceased while sick, the plaintiff was not allowed to give in evidence a conversation with deceased as to the debt, from the mere fact that the defendant had testified that the plaintiff went to the bedside of deceased, but gave no evidence of the conversation. *Bowers v. Smith*, 3 Supp. 105 ; 19 St. Rep. 926.

A claimant who put in evidence letters written to him by the deceased, mentioning some of the services claimed for, where it appeared the claimant was present with deceased during a portion of the time that such services were rendered, cannot be asked, "What was the fair reasonable value per day of the services so performed by you, as appears by the evidence herein?" *Yates v. Root*, 4 App. Div. 439.

In an action against an executor to recover for board and lodgings furnished the deceased, it seems that when the plaintiff alleges non-payment therefor, in her complaint, she is not bound to prove that fact. *Hicks Alixanian v. Walton*, 14 App. Div. 201.

Claimants against estates of decedents are "necessarily prejudiced" within the meaning of section 2545 of the Code, by the admission in evidence of declarations of the deceased that the claim in question was not owing. *Matter of Wilson*, 10 App. Div. 371; *sub nom. Wilson v. Maryatt*, 41 Supp. 1006.

Where a person makes a claim for services against the estate of deceased, in which proof is lacking of their rendition at the request of deceased with expectation of compensation, a memorandum found deposited with his will, directing his executors to pay the claimant a certain sum, followed by the words, "I owe him that," may, in the absence of other explanation, be connected by inference with the services, and so furnish the element lacking in the oral proof. *Matter of Gallagher*, 153 N. Y. 364. Where services are rendered by one member of the same household to another, the legal presumption is that the services were gratuitous, and it is necessary to a recovery by such claimant against the estate of a person to whom the services were rendered that there shall be clear and positive proof of an express promise to pay therefor on the part of such deceased. *Matter of Pfohl*, 20 Misc. 627.

*Gifts inter vivos.* In order to constitute a valid gift *inter vivos*, the donor must be competent to contract, there must be freedom of will, the gift must be complete with nothing left undone, the property must be delivered by the donor and accepted by the donee, and the gift

must go into immediate and absolute effect. *Rix v. Hunt*, 16 App. Div. 540 ; *Matter of Rogers*, 10 Id. 593 ; 42 Supp. 133 ; 76 St. Rep. 133.

When the parties are not upon an equality, the burden is upon the stronger party of showing that no advantage was taken of the weaker. *Matter of Rogers, supra*.

A gift *inter vivos* may, however, be supported, although there is no direct and positive proof of delivery. *Rix v. Hunt*, 16 App. Div. 540.

The delivery necessary to constitute a gift depends upon the character of the thing given. *Matter of Wachter*, 16 Misc. 137 ; 38 Supp. 941.

Where a father, with intent to make a gift to his son, directs the bookkeeper to transfer to his own account the debit standing against the latter on the books, and a memorandum thereof is made, the gift is complete although the ledger entry is not made until after the donor's death. *Maclay v. Robinson*, 91 Hun, 630 ; 36 Supp. 530 ; 71 St. Rep. 561.

A deposit of money by a wife in the name of her husband as trustee for a third person is a valid gift to such person, although the husband expresses an intention to, and does, control the deposit during his life. *Fraleigh v. Cadman*, 11 App. Div. 628 ; 41 Supp. 981.

Where a husband deposits money in a savings bank to the credit of his wife, or himself or the survivor, this represents a gift to the wife if she survives her husband ; and a delivery of the pass-book by the husband to the wife is not necessary to vest the gift in her. *McElroy v. Savings Bank of Albany*, 8 App. Div. 192 ; 40 Supp. 340. On the other hand, it has been held that the mere possession of a savings bank book and a check which had

been drawn by a deceased depositor is not sufficient to show a gift thereof; an intention of the deceased to part absolutely with the possession of the property and a delivery must be shown. *Dinley v. McCallagh*, 92 Hun, 454; 36 Supp. 1007; 72 St. Rep. 416.

But held that a delivery to a donee of a check payable to his order is sufficient to constitute a gift of the money. *Picksley v. Starr*, 149 N. Y. 432; aff'g 74 Hun, 10; 59 St. Rep. 603; 27 Supp. 616.

Where there has been a complete gift, subsequent possession by the donor, if satisfactorily explained, will not divest the donee of title. *Matter of Wachter*, 16 Misc. 137; 38 Supp. 941.

Where the sole witness to a gift has testified that at the time mentioned the donor executed a will, the adverse party has a right to the use of the alleged will, to assist him in examining the witness as to its expiration, and to use as evidence if it disproves the gift. *Wheelan v. Yorton*, 15 Misc. 625; 37 Supp. 344; 72 St. Rep. 697.

As to the competency of evidence relating to the establishing of gifts of this character, see section thirty-seven, *ante*.

*Gifts causa mortis*. One who has testamentary capacity is competent to make a gift *causa mortis*. *Matter of Hall*, 16 Misc. 174; 38 Supp. 1135. Gifts *causa mortis* are revocable by the recovery of the donor from the illness under which he was suffering at the time he made the gift. *Tusch v. German Savings Bank* 20 Misc. 571.

A delivery to a third person for the donee is sufficient, although the donor dies before the property is handed to the donee. *Id*.

Also held, that a certificate of deposit is a proper subject for such a gift. *Id.*

Where the alleged donor, a few days before her death, sent for two persons, with one of whom she had left her bank book for safe keeping, and upon their arrival demanded the book, examined it, and called upon them to witness that the book belonged to the plaintiff, to whom she handed it, and to whom she subsequently told in substance to let the witness take it back with her until called for after death, it was held a good delivery and a valid gift. *Callahan v. Clement*, 18 Misc. 621 ; 42 Supp. 514 ; 76 St. Rep. 514. An instrument executed and acknowledged by a man at the point of death, constituting a certain person his attorney, with directions for disposing of his property after death, accompanied with the delivery of his bank book, is to be deemed a trust of personal property and not a mere power of attorney. *Tusch v. German Bank*, 20 Misc. 571.

As to the competency of evidence relating to the fact of such gifts being made, see section thirty-seven, *ante*.

§ 39. **Books of account.** Books of account kept by a deceased party are competent in evidence, when accompanied by the required preliminary proof.

The preliminary proof necessary to admit such books in evidence must show :

First : That the deceased kept no clerk, and that he kept fair and honest books.

Second : That some of the goods charged have been delivered.

Third : Proof by some witness who has dealt with him and settled from such books of account, that the party kept fair and honest accounts.

*Dooley v. Moan*, 33 St. Rep. 118 ; *Beatty v. Clark*, 44

Hun, 126 ; 8 St. Rep. 423 ; *Irish v. Horn*, 84 Hun, 121 ; 32 Supp. 455 ; 65 St. Rep. 641 ; *Young v. Luce*, 21 Supp. 225 ; 50 St. Rep. 253. When the party and the clerk who made the original entry are both dead, the book may be admitted in evidence when accompanied by the preliminary proof already alluded to and supplemented by proof of the clerk's death and proof of his handwriting. *Dakin as Exr. v. Walton*, 85 Hun, 561 ; *Beaver v. Taylor*, 68 U. S. (1 Wall.) 637.

It has been held that an original entry in books of the testator, nineteen years before the proceedings were at issue, were competent as evidence without showing who made it. *Rodman v. Hoop*, 1 U. S. 85. But held, that evidence that witnesses who had never seen the books of account of a merchant had settled bills rendered to them by him, supplemented by the testimony of his book-keeper that the bills rendered were correct statements from the accounts in the books, is not sufficient to make the books competent as evidence of sales. *Powell v. Murphy*, 18 App. Div. 25.

Entries made by a physician are admissible in evidence to show services to the deceased though relating to personal transactions, if accompanied with the proper proof. *Wetmore v. Peck*, 19 Alb. L. J. 400. But his books are not competent to establish the rendering of services to the deceased, where, exclusive of the same, there is no proof of these facts. *Davis v. Seaman et al.*, 64 Hun, 572 ; 21 Supp. 260.

Neither is his diary admissible, unless he first proves that the entries were made by him, that he keeps correct books, and that other debtors have settled with him on the strength of the entries therein contained. *Knight v. Cunningham*, 6 Hun, 100. But where it was proved

that a physician had attended at the birth of one whose age was the subject, that he was in practice many years prior to the said birth and after, that he kept a register of all cases of birth, and that this was in the register at a time specified, and also the subsequent entries of a birth of a brother and sister ; it was held that the entries were competent. *Arms', etc., Admrs' v. Middleton*, 23 Barb. 571.

Where the defendant's testator kept the usual set of books, and in them there appeared an account with the plaintiff, it was held that the entries could be received in evidence, and were admissions that the facts therein described occurred, although the plaintiff knew nothing of the entries. *Griggs v. Day*, 58 Supr. 385.

It has also been held that the introduction in evidence by the executors of the testator's books of account is not such testimony of the deceased as will render admissible the testimony of a legatee as to personal actions with testator. *Benjamin v. Dimmick*, 4 Redf. 7 ; *Contra, Marsh v. Brown*, 18 Hun, 319. It was held, upon an accounting, that an executor cannot testify to, nor are his books admissible in support of, a claim against the estate for money advanced to decedent by him. *Elmore v. Jacques*, 2 Hun, 130 ; rev'd on other points, 60 N. Y. 610. See *Jacques v. Elmore*, 7 Hun, 675.

§ 40. **Conversations that are incompetent.** The prohibitions of the statute include testimony which entails any conversation with the deceased under certain prescribed conditions and circumstances. The examples here given are in addition to those already discussed under the section relating to TRANSACTIONS with the deceased, and must be considered with those therein cited, if a complete digest of such decisions is desired.



Communications are defined as including every method by which one person can obtain any impression or information from another. These must have been personal in their nature, but not necessarily private or confidential. *Holcomb v. Holcomb*, 95 N. Y. 316 ; rev'g 20 Hun, 156 ; *Campbell v. McGuire*, 53 Supr. 574.

Thus in an action upon a claim against the estate of the deceased for the board of a nephew and niece, it was held that the plaintiff could not testify as to whether he had a conversation with the deceased as to their coming to the house. *Heyne v. Doerfler*, 124 N. Y. 505 ; rev'g 32 St. Rep. 960.

Neither can a defendant give testimony where he could otherwise be prohibited, merely from the fact that the plaintiff, the executor of deceased, was present at the time. *Howell v. Taylor*, 11 Hun, 214 ; *Cornell v. Cornell*, 12 Id. 312.

Thus where defendant in a partition suit claimed title under an arrangement with his deceased father, he was held incompetent to testify to the conversation between his father and mother, in which he participated. *Smith v. Ulman*, 26 Hun, 386.

A principal devisee cannot testify to any conversation with the testator during the last weeks of his life, attending the attestation and publication of his will. *Matter of Eysamen*, 113 N. Y. 22 ; 22 St. Rep. 136.

An administrator, who is also the plaintiff, cannot testify to conversations had with the defendant's testator before he was appointed an administrator. *Poucher v. Scott*, 33 Hun, 223 ; aff'd 98 N. Y. 422.

In an action brought by the *cestuis que trust* against the decedent's administrators and trustees to recover the trust fund, the trustee cannot testify as to what occurred

between him and the deceased donor, against the administrators. *Wilkins v. English*, 24 Hun, 32.

A witness whose dower interest is at stake, and who took part in a conversation with the deceased, cannot testify to the same. *Eckert v. Eckert*, 13 App. Div. 490. Also, one who is the wife of the defendant, and also a party to the action, to determine the validity of a will, under which she could become entitled to her dower, is incompetent as to conversations with deceased. *Johnson v. Cochrane*, 91 Hun, 165 ; 36 Supp. 283 ; 71 St. Rep. 214.

In an action brought by certain heirs of deceased, to set aside, on the ground of fraud and incompetency, a deed executed by deceased to one of the defendants, in which certain other of the heirs were made parties defendant, one of such heirs may testify, in behalf of the alleged fraudulent grantee, to statements made by deceased. *Baxter v. Baxter*, 13 App. Div. 65.

Also, in an action brought by an administrator, it was held that the defendant could not testify to a conversation with the alleged intestate tending to prove he was alive. *Pashan v. Moran*, 4 Hun, 717 ; aff'd 71 N. Y. 596. Also, in an action to foreclose a mortgage made by defendant and wife, where the latter is made a party, she cannot testify to the conversation between the deceased and herself relative to the making of the loan, even though she has defaulted in answering. *Farnsworth v. Ebbs*, 2 Hun, 438. This construction of the law, however, except in these cases specified in the section, does not seem to be the rule at present.

§ 41. **Conversations that are competent.** The prohibitions of this section do not extend to the exclusion of testimony which tends to show that the witness has testified falsely.

Thus, the defendant may testify that a conversation did not take place in the room where the witness stated it did, but in another. *Pinney v. Orth*, 88 N. Y. 447 ; *Corney v. Wadhams*, 9 Civ. Pro. 204.

Also, in an action for admeasurement of dower, a witness for the plaintiff had testified that in a conversation with decedent he had stated that he was married. He was asked if he did state in another conversation that he had not been married when his sister was present. Upon his denying this, his sister was held to be a competent witness to give that conversation. *Badger v. Badger*, 88 N. Y. 546.

It was held, in an action against an executor in his individual capacity, although growing out of matters connected with the estate in which he was interested, that this section did not apply. *Hall v. Richardson*, 22 Hun, 444 ; aff'd 89 N. Y. 636. Also, in an action to foreclose a mortgage, a second mortgagee was permitted to testify to conversations between himself and a deceased mortgagor. *Clark v. McNeal*, 114 N. Y. 287.

This section does not disqualify an executor from giving testimony as to personal transactions or conversations with the deceased in favor of the personal representative of deceased. *McLaughlin v. Webster*, 141 N. Y. 76 ; 56 St. Rep. 541. Also, testimony given on a special proceeding in behalf of administrators who are parties is not incompetent, and this though the witness was, as administrator, a party to the proceedings. *Matter of Babcock*, 12 St. Rep. 841 ; 46 Hun, 682. Also, an executor who is not a legatee, nor interested, may prove the execution of the will. *Children's Aid Soc. v. Leveridge*, 70 N. Y. 387 ; *Wheepsley v. Lodar*, 1 Dem. 368 ; *Reeve v. Crosby*, 3 Redf. 74.

In an action brought by a trustee against his co-trustee, to have lands standing in the name of the deceased declared part of the trust estate, the surviving husband of a deceased sister of deceased trustee, whose children are interested in the estate, is a competent witness to conversations had with deceased. *Conklin v. Snider*, 104 N. Y. 641.

In an action of interpleader, where the issue was whether a mortgage assigned to the deceased, the trustees of whose will were the defendants, was assigned absolutely, or for the benefit of the wife of the mortgagee; a witness for the plaintiff, who had acted as the counsel for the mortgagee in the execution and assignment of the mortgage, was held competent to testify that the deceased told him that the mortgagee wanted him to take the assignment and hold it for his wife. *Brennan v. Hale*, 39 St. Rep. 130; 20 Civ. Pro. 434; 14 Supp. 864; 17 Id. 6; 42 St. Rep. 919; aff'd 131 N. Y. 160.

Neither does a lien for costs render an attorney incompetent under this section. *Sherman v. Scott*, 27 Hun, 331; 2 Civ. Pro. 366. An attorney is also competent, although he has issued execution and superintended the levy thereunder, in an action brought by the assignee of the mortgagee, who held a chattel mortgage on the property levied on, against the client of the attorney. *Payne v. Kerr*, 21 Supp. 881.

A party may testify to conversations with the deceased which are against her own interests. *Davis v. Gallagher*, 55 Hun, 593; 29 St. Rep. 882; 9 Supp. 11.

§ 42. **Conversations between deceased and third parties.** There exists a great difference in the application of this section to conversations between the deceased and third persons, in the presence of an interested party, as

to whether the evidence is offered in probate or other actions.

The whole trend of the later authorities seems to show conclusively that all such testimony, if it relate to material facts, are excluded, in all probate proceedings and all other cases where a will, other instrument or act is contested on the ground of undue influence, fraud, restraint or mental incapacity. *Ditmars v. Sackett*, 92 Hun, 381 ; 36 Supp. 690 ; 71 St. Rep. 710.

This rule, however, also depends for its enforcement or abatement upon several facts.

If the person present, or overhearing the conversation relating to which he is about to testify, comes within the definition of an interested party in the result of the action, the rule applies, if the conversation or transaction relates to matters between the deceased and the witness. *Brague v. Lord*, 67 N. Y. 495 ; rev'g 41 Supr. 193. Formerly, the rule seems only to have been invoked if the witness in any way participated in the transaction or took part in the conversation. *Smith v. Ullman*, 26 Hun, 386 ; *Ross v. Harden*, 42 Supr. 427 ; *Moyer v. Moyer*, 21 Hun, 67.

Thus, in an action brought to recover the proceeds of certain bonds alleged to have been placed by the plaintiff in the hands of the defendant's testator, the plaintiff testified that part of her bonds had been stolen prior to the alleged delivery of the remainder to the deceased, that he came to her rooms at the time of the discovery of the theft, and returned with a detective. It was held error to have allowed her to testify that on the second visit the deceased had said that the theft was not the work of a professional thief or he would have taken all of them, whereas he had left a balance of \$12,000 ; at the same

time taking the same out of his pocket and exhibiting them with the remark that they would not get any more, because he was going to put them in the bank for plaintiff. Plaintiff also testified that she had spoken more than once during the conversation. *Price v. Price*, 33 Hun, 69.

It has, however, been held that a witness might testify to such facts, even if he participated in the conversation, if what is to be proved is limited to what is neither a personal transaction nor communication between witness and deceased. *Patterson v. Copeland*, 52 How. Pr. 460; *Benedict v. Phelps*, 2 Week. Dig. 150; *Cary v. White*, 59 N. Y. 336. But it has been also held that these decisions do not apply to a case where the third party present was agent for witness. *Head v. Feeter*, 10 Hun, 548.

A witness, who was the plaintiff's wife, was held incompetent as a witness, in an action brought against the administrator to recover damages for fraud on the part of defendant's intestate in making a sale, to testify to a conversation between deceased and her husband in her presence in which she participated, as she was an interested party. *Eighmie v. Eighmie*, 68 Hun, 573. Neither can a witness relieve himself of this disability, by leaving out his share of the conversation and only stating what occurred between the others. *Ross v. Harden*, 42 Supr. 427.

In an action against a constable to recover attached property on the ground that it belonged to the plaintiff's intestate, while his declarations to third persons as to ownership were held admissible, the evidence of the plaintiff in the attachment proceedings as to a conversation had with another was not competent. *Wooster v. Booth*, 2 Hun, 426.

The rule is now much more restricted than formerly, our courts now holding that conversations made in the presence of a witness are made to him, and the present policy is to exclude any transaction which took place in his presence, or any conversation which took place in his hearing, if he is in any way a party thereto. *Holcomb v. Holcomb*, 95 N. Y. 316; *Lane v. Lane*, Id. 494; *In re Smith*, Id. 516; *Matter of Eysaman*, 113 Id. 62; *Matter of Will of Dunham*, 121 Id. 575.

Thus, a beneficiary under a will is incompetent to testify to any conversation or transaction which occurred in his presence at the time of the execution and publication of the will. It is held that what took place at that time is a transaction between the testator and witness, although the latter in no wise participated in the conversation, and it was wholly between the testator and the subscribing witness. *In re Will of Bernsee*, 141 N. Y. 389.

But in an action for partition, where the defendant set up an alleged will by which all the lands were devised to him, it was held that the plaintiff's testimony as to a conversation between the defendant and her deceased father was not an error calling for a reversal, since, as deceased had been shown incapable of making a will, the testimony was immaterial. *Petrie v. Petrie*, 38 St. Rep. 496; aff'd 126 N. Y. 683.

In an action brought for legal services, rendered to the defendant's testator, it was held that the plaintiff could not testify that the deceased had said to his brother in his presence, "We cannot tell what we have to pay until we know what our lawyer charges us," turning his head toward the plaintiff. *Brague v. Lord*, 67 N. Y. 496; 2 Abb. N. C. 1; rev'g 41 Supr. 193.

Also, in an action for specific performance of a parol agreement of deceased to convey land to the plaintiff, the latter's wife, who was interested in the event of the action, was held incompetent as a witness to a conversation between her husband and the deceased, although she had in no manner participated in it. *Erwin v. Erwin*, 26 St. Rep. 759. Also, where it was attempted to prove a gift *causa mortis* the plaintiff was not allowed to testify to a conversation held in her presence between the deceased and a Catholic priest relative to the gift claimed by her. *Devlin v. Greenwich Savings Bank*, 125 N. Y. 756.

Where the probate of a codicil of a will was resisted on the ground of undue influence, restraint and mental incapacity, it was held that a residuary legatee could not testify to a conversation and transaction between the testator with witness and others in his presence. *Matter of Will of Dunham*, 121 N. Y. 575. Nor can a party testify to statements made by the deceased in his presence, to another who was engaged in drawing up the papers relating to the business transaction at issue. *Kraushaar v. Meyer*, 72 N. Y. 602.

Neither will the fact that at the time of the conversation in question the witness was not an interested party have any bearing upon such incompetency. The question of disqualification depends entirely upon the facts as they exist at the time when the testimony of the witness is to be used, and if such disqualification exists then, it extends to, and renders incompetent, the testimony as to transactions or conversations which occurred before the witness became interested. *Eighmie v. Taylor*, 68 Hun, 573. But see *Gross v. Wellwood*, 9 St. Rep. 587.



§ 43. **The rule in other cases.** While in the cases already discussed, and in proceedings based upon the grounds specified in the last section, the rule is strictly enforced, yet it does not appear that the same limitations prevail in actions of a different nature, or those founded upon other causes. In the latter class of actions, the tendency of our courts is to a relaxation of the rule to some extent, and the law at present is that, in such proceedings, an interested witness may testify to transactions or conversations which took place in his presence, between the deceased and third parties, provided he was not referred to by the parties thereto and did not participate therein by word, sign or act. *O'Brien v. Weiler*, 140 N. Y. 281; *Simmons v. Havens*, 101 N. Y. 433; *Cary v. White*, 59 N. Y. 336; *Kaushaar v. Meyer*, 72 N. Y. 602; *Holcomb v. Holcomb*, 95 N. Y. 316, 325; *Lane v. Lane*, 95 N. Y. 494, 502; *Hildebrant v. Crawford*, 65 N. Y. 107; *Eighmie v. Taylor*, 68 Hun, 571; *Matter of Hartman*, 13 Misc. 486.

Thus it has been held that a person may testify to such matters against an heir at law which would tend to show a transaction between witness and deceased. *Sanford v. Sanford*, 61 Barb. 293; 5 Lans. 486. Also held, that a party might testify to a conversation of this nature heard by him between the principal and agent, who were both dead, as against a successor in interest of the principal. *Hildebrant v. Crawford*, 65 N. Y. 107.

In an action of ejectment, the plaintiff was allowed to testify to a conversation between her deceased mother and the defendant. *Simmons v. Havens*, 101 N. Y. 428.

Also held, under the old Code, that a witness might so testify to a transaction which affected the estate of the decedent, where heirs at law were parties plaintiff. *Lob-*

*dell v. Lobdell*, 36 N. Y. 326. Also, that one sued by an administrator could testify to conversations overheard by him between deceased and third parties. *Simmons v. Sisson*, 26 N. Y. 264.

§ 44. **Testimony in own behalf.** By the word "testimony" in this section is meant sworn statements of the deceased made on some prior occasion. *Matter of Callister*, 153 N. Y. 294. A promissory note executed by decedent was read in evidence by his representatives. Held, that the living party thereto could not testify as to what was said and done at its execution, as such a document may be "evidence" but is not testimony. *Id.* The prohibitions of this section do not apply where the adverse party is the assignee of a devisee of the deceased person, and in an action brought by such an assignee, the defendant is competent in his own behalf to testify to transactions or conversations with decedent. *Theall v. Steitz*, 6 Daly, 482.

But in an action against the heirs of a deceased person for specific performance of contract for sale of lands made with such deceased, wherein admissions of the plaintiff have been proven, showing that he agreed to pay thirty dollars an acre therefor, he cannot be asked, "Did you agree to pay thirty dollars an acre for the land?" *Chadwick v. Fonner*, 69 N. Y. 404; rev'g 6 Hun, 543.

But held in an action brought by an administrator in behalf of a creditor, to set aside a deed made by the intestate, on the ground of fraud, that one of the parties could testify in her own behalf both as to the statements made by the grantor at the time of the transaction, and also to his physical condition. *Matter of Davis*, 60 Hun, 198.

Also, upon the settlement of an account of a deceased executor, where the accounting party testified to an agreement between the former and the beneficiaries, it was held that one of the objectors could testify in his own behalf in reference thereto. *Shepard v. Patterson*, 3 Dem. 183.

Also held, that the testimony of a plaintiff upon a former trial could be used, although since that time one of the defendants had become insane, and the action is continued against the committee. *Morehouse v. Morehouse*, 41 Hun, 146.

Also held to the same effect where both parties had been examined before trial, and the defendant had since died. *Rice v. Motley*, 24 Hun, 143 ; *McDonald v. Woodbury*, 30 Hun, 35.

Where a farm was worked by the defendant under an oral agreement with the deceased, and the devisee after his death agreed to allow him to continue working the farm under the same terms as his original letting, it was held that the defendant could testify to the agreement thereto between himself and the deceased. *Titus v. O'Connor*, 18 Hun, 373 ; 57 Id. 391.

But where the executor, the plaintiff, was examined as a witness as to the language used by the defendant in asserting his claim for unpaid rent, it was held that this did not authorize an examination of the defendant in his own behalf to show the agreement with deceased in reference to such hiring of the property. *Hammond v. Schultze*, 45 Supr. 611.

Also held, that the provisions of this section apply where the plaintiffs call the defendant, through whom they claim title, as a witness in their behalf against his co-defendant, the administrator. *Id.*

§ 45. **In behalf of co-plaintiff or co-defendant.** The prohibitions of the statute which apply to a witness in his own behalf, apply with equal force to cases where the parties are called as witnesses in behalf of their co-plaintiffs or co-defendants, or where they are jointly or severally liable. *Alexander v. Dutcher*, 70 N. Y. 385 ; *Bennet v. Austin*, 5 Hun, 536.

Thus, in an action brought by the personal representatives of deceased upon a promissory note against the maker and indorser, neither of the defendants can testify in favor of the other as to personal transactions with the deceased although they put in separate answers. *Id.* And that notwithstanding the indorsers executed a release to the maker. *Alexander v. Alexander*, 7 Hun, 439 ; aff'd 70 N. Y. 385. *Genet v. Lawyer*, 61 Barb. 211. Also, upon the trial of an action brought by the administrators of a deceased payee of a promissory note against the makers thereof, when one claimed to be liable as a surety only, and the other put in no defense, the latter cannot testify in behalf of his co-defendant as to such matters. *Hill v. Hotchkiss*, 23 Hun, 414 ; *Church v. Howard*, 79 N. Y. 415. Also held that the same prohibition applies to a mortgagee in behalf of a defendant mortgagor as to conversations with plaintiff's testator, the mortgagor. *Hadsall v. Scott*, 26 Hun, 617.

But in an action by the testator's son to enforce an agreement made by the testator to convey certain real estate to him, it was held that the testator's widow, to whom decedent had given a life estate in the lands in question, but who had allowed a default to be taken against her as a defendant in the action, could testify for the plaintiff as to the agreement. *Brown v. Brown*, 29 Hun, 498.

§ 46. **Administration.** The restrictions upon testimony as to transactions or conversations with deceased intestates in actions or proceedings where administrators or executors are parties are similar to those already referred to.

Thus, upon application for letters of administration, it was held that a widow was incompetent to testify to her marriage with the deceased. *Angevine v. Angevine*, 48 Barb. 417. Also, in an action by an administrator to recover property of the deceased which was alleged to have been converted, evidence of a person through whom defendant claimed title, tending to establish a parol gift from deceased, was held incompetent. *White v. White*, 16 Week. Dig. 45.

But in an action by an administrator to set aside a deed from the decedent to the defendants as in fraud of decedent's creditors, it was held that the defendants could testify as to conversations with the deceased relative to the transaction. *Miller v. Davis*, 14 Supp. 725 ; 37 St. Rep. 854 ; 20 Civ. Pro. 414. Also, in a similar suit brought against the administrator, it was held that the latter was not incompetent to testify in behalf of such grantee to declarations made by decedent concerning her indebtedness to the grantee. *Swan v. Morgan*, 88 Hun, 378 ; 34 Supp. 829 ; 66 St. Rep. 768.

But also held, that where an action has been brought by an administrator, the defendant cannot testify to conversations with the alleged intestate held prior to the issuing of such letters of administration, tending to show that such person was still alive. *Parhan v. Moran*, 71 N. Y. 596 ; aff'g 4 Hun, 717.

Where a judgment was obtained by default against a defendant since deceased, and it was shown that the same was entered by fraud and collusion, and a motion

to open the default and allow the administrator to defend was granted, it was held that in such a case the testimony of the plaintiff as to the loaning of money to the defendant was inadmissible, when there was no testimony on the part of the administrator as to any communication concerning the making or delivery of the note sued upon or the recovery of the judgment. *Hartigan v. Nagle*, 11 Misc. 449 ; 32 Supp. 220 ; 65 St. Rep. 419.

Where the petitioner for letters of administration claimed to be the child and only next of kin of the deceased, the sister of the deceased was held incompetent to testify in opposition thereto as to declarations of the deceased that the former was not his child. *Estate of Molter*, 22 Week. Dig. 507.

Upon an accounting by an administratrix, she presented a claim for services rendered by her against the estate of the decedent. Upon the trial, a note which she held against him was produced by her at the request of the next of kin, who offered it in evidence. It was held that the administratrix was incompetent to testify as to the consideration thereof or the circumstances under which it was given, which involved a transaction with the deceased, in order to rebut the presumption created by the note against her individual claim. The ground of this decision being that as the note was in no sense the testimony of the decedent, the next of kin, by calling for its production, could not be said to have given in evidence testimony of the deceased. *Matter of Callister*, 88 Hun, 87 ; aff'd 153 N. Y. 294.

§ 47. **Deriving title or interest.** The words of this section "deriving title or interest" should be construed as if they read, "claiming to derive title or interest." *Estate of Voorhis*, 1 How. Pr. N. S. 261.

This section does not exclude evidence of any personal transactions between a witness who is a party to the action and a person since deceased from whom the witness claims title, but only between the witness and the person from whom the other party to the action, against whom the testimony is given, claims title. *Lyon v. Whittaker*, 77 Hun, 107 ; 28 Supp. 296 ; 59 St. Rep. 844.

Contestants of probate of wills come within this section. *Matter of Will of Smith*, 95 N. Y. 516 ; *Cadmus v. Oakley*, 3 Dem. 324.

A party is incompetent to testify to a conversation between himself and a deceased grantor, under whose conveyance the opposite party claims, although the latter was not the immediate grantee of the deceased, but derived his title through mesne conveyances. *Pope v. Allen*, 24 Hun, 604 ; aff'd 90 N. Y. 298.

The same prohibition applies to the assignee of a mortgage, and the assignor of an equity of redemption. *Smith v. Cross*, 90 N. Y. 549 ; *Foote v. Beecher*, 78 Id. 155. Declarations or admissions of a deceased grantor of lands contained in a letter to the state comptroller, stating he had conveyed the same to other parties, are not competent against those who claim under him, when the records show no such conveyances. *Marsh v. Ne-ha-sa-ne Park Assoc.*, 18 Misc. 314 ; 82 Supp. 996 ; 76 St. Rep. 996.

But a wife, the defendant in an action brought by creditors to set aside certain conveyances made to her by the decedent, was allowed to testify to personal transactions between herself and husband on the ground that the plaintiffs did not claim under the husband. *Gillies v. Kreuder*, 33 Hun, 314 ; aff'd 102 N. Y. 666.

In an action of trespass upon land against one who claims to have entered as the agent of the owners, the

plaintiff's grantors are not competent witnesses to conversations between them and a deceased person through whom the defendant's principal claims. *Wheelock v. Cuyler*, 4 Hun, 414; *Bockes v. Lansing*, 13 Id. 38; aff'd 74 N. Y. 437. Also, where the former owner of chattels, by transferring the same, became the agent of the transferee, and had bailed them with the defendant without declaring his agency, it was held, in an action by his principal against the defendants, that he could not testify to a demand made on one of the defendants since deceased and a refusal to deliver. *Conway v. Moulton*, 6 Hun, 650.

Also, in an action to establish the plaintiff's title to real estate, by having a deed to the defendant's ancestor declared a mortgage, with a provision entitling plaintiff to a conveyance of the title, the grantor, being the party through whom the plaintiff claimed title, was held to be incompetent to prove the signature of the grantee thereto. *Garvey v. Owens*, 37 Hun, 498.

But evidence to prove the signature of an intestate to an instrument given by him to the mother of the witness is competent. *Estate of Waldron*, 16 Week. Dig. 28. Also held, that a party may give testimony in her own behalf as to having possession of a deed, and that the signature is in the handwriting of her grantor, without stating from whom she received it. *Simmons v. Havens*, 101 N. Y. 427; aff'g 29 Hun, 119. Also, a grantee may testify to occupation under a deed, the renting and collecting the rents of the same, as against a purchaser from the heirs of a deceased grantor. *Strough v. Wilder*, 49 Hun, 405; 22 St. Rep. 480; 3 Supp. 567.

But a grantor under such circumstances cannot testify to the consideration of the deed. *Ballou v. Ballou*, 78



N. Y. 320. Held, however, that a party claiming under a written transfer of property from the deceased may testify, as against the representatives, that he paid the doctor's bills and funeral expenses of the deceased, as part of the consideration. *Savercool v. Wilsey*, 5 App. Div. 562 ; 39 Supp. 413.

In an action to recover a specific fund, where the defendant claimed that the money belonged to, and was placed by him in the hands of, the deceased, it was held that he could not testify to any transactions on the subject, as the plaintiff acquired whatever interest she had from the decedent. *Mason v. Prendergast*, 120 N. Y. 536. Also, in an action by an administrator to recover property of the deceased, which was alleged to have been converted, evidence of a person through whom the defendant claimed title, tending to show a parol gift to him from decedent, was held inadmissible. *White v. White*, 16 Week. Dig. 45.

Where a widow claimed title under a deed alleged to have been executed by a deceased ancestor and wife of the adverse party, she was allowed to testify in her own behalf to conversations with the deceased wife, on the ground that the adverse party, the heirs, did not claim through the decedent. *Matter of N. Y. C., etc., R. Co.*, 90 N. Y. 342.

In an action to enforce a lien on a bond held by a bank of which the plaintiffs were the receivers, the debtor's wife claimed the bond ; but there was no evidence that she derived any title or interest therein from the debtor, and it was held that the debtor could testify as to a demand on behalf of his wife made by him upon the plaintiff's deceased predecessor for the bond. *Olcott v. Kohlsaat*, 27 St. Rep. 900 ; 8 Supp. 116. Also, a widow

plaintiff, in an action to set aside a deed executed by herself and deceased husband, was held competent to testify to the transaction, on the ground that the defendant's title to her dower right was derived through her directly and not through the decedent. *Witthaus v. Shaack*, 24 Hun, 328.

It has also been held that a husband does not derive his right to recover against the estate of a deceased person for services of his wife, through or under her, but by virtue of his common-law right, and his wife is not disqualified from testifying in an action to recover for services rendered to the deceased, as to the circumstances of her engagement. *Porter v. Dunn*, 131 N. Y. 314; rev'g 61 Hun, 310; *Hopkins v. Clark*, 90 Hun, 4; 35 Supp. 360; 69 St. Rep. 849.

It has been held that the prohibitions of the statute are not to be taken as limited to an examination pertaining to parts of the action, but extend to the entire action. *Lyon v. Snyder*, 61 Barb. 172.

An executor, administrator or others cannot avail themselves of the advantages of the statute where they are parties or interested, not in their representative capacities, but as individuals. *Matter of N. Y. C., etc., R. Co.*, 90 N. Y. 342; *Barey v. Eq. L. Ins. Soc.*, 59 N. Y. 587; *Stephens v. Cornell*, 32 Hun, 414; *Witthaus v. Schaack*, 24 Id. 328; *Titus v. O'Connor*, 18 Id. 373; *Hall v. Richardson*, 22 Id. 444.

§ 48. **Declarations of deceased.** As a general rule the declarations of the deceased cannot be used in evidence when, if alive, he would have been a party to the action or proceeding, or interested in the result thereof, or come within the description of persons mentioned in the statute.

Thus, in an action brought by the grantee of mortgaged premises to have the mortgage cancelled, one through whom the plaintiff derived title was held incompetent to testify as to declarations of the deceased mortgagor. *Foot v. Beecher*, 78 N. Y. 155; rev'g 12 Hun, 374. Also, in an action against an administrator for board and services rendered to intestate, the declarations of the latter were held inadmissible. *Underhill v. Nichols*, 8 Wk. Dig. 276. Also, in an action by an administrator to recover property from those who claimed it by gift from the deceased intestate, his declarations, inconsistent with the gift, were not allowed. *Graves v. King*, 15 Hun, 367. Neither can the title to a cause of action by gift from a person since deceased be established by mere proof of the declarations of the deceased imparting a gift, nor can the delivery be inferred from the testimony of the donee. *Johnson v. Spies*, 5 Hun, 468.

Declarations of a decedent as to the amount or value of his property are not competent to charge the executors with the same. *Ginocchio v. Porcella*, 3 Bradf. 277. Neither are the declarations or admissions of a deceased grantor of lands, contained in a letter to the state comptroller, and stating that he had conveyed the same to others, when no such conveyances appear on record, as against those who claim under him. *Marsh v. Ne-ha-sa-ne Park Ass.*, 18 Misc. 314; 82 Supp. 996; 76 St. Rep. 996.

Where the petitioner for letters of administration claimed to be the child and only next of kin of deceased, the sister of the deceased was held incompetent to testify in opposition thereto as to declarations of deceased that the petitioner was not his child. *Estate of Molter*, 22 Wk. Dig. 507.

But a deposition taken during the lifetime of the deceased, on interrogation and cross-examination, is not inadmissible. *Roland v. Pinckney*, 8 Misc. 458.

Also, in an action brought by an administrator to set aside a deed from decedent to defendants, as in fraud of creditors of deceased, it was held that the defendants could testify as to declarations of deceased relative to such transaction. *Miller v. Davis*, 14 Supp. 725 ; 37 St. Rep. 854 ; 20 Civ. Pro. 414.

Also, in a similar suit brought against the administrator, it was held that the latter was competent, in behalf of the grantee, to testify to declarations of the deceased concerning her indebtedness to the grantee. *Swan v. Morgan*, 88 Hun, 378 ; 34 Supp. 829 ; 66 St. Rep. 768. But declarations of an intestate, binding or impairing his estate, may be given in evidence against his personal representatives in all cases where it would have been competent against himself were he living and a party. *Matter of Smith*, 18 Misc. 139 ; 41 Supp. 1093.

§ 49. **Negative and affirmative.** Everything in any way relating to the conversation or transaction which is material to the issue is protected by this section. Thus, generally speaking, this prohibition includes both the affirmative and negative. *Haughey v. Wright*, 12 Hun, 179 ; *Barrett v. Carter*, 3 Lans. 68 ; *Stanley v. Whitney*, 47 Barb. 586 ; *Clarke v. Smith*, 46 Barb. 30.

Any testimony which tends to the inference that no personal transaction took place between the witness and the deceased is within this section. *Hill v. Hemans*, 17 Hun, 470.

An interested party cannot testify that an alleged conversation or an interview concerning the agreement or transaction at issue did not take place, any more than

he can testify concerning the transaction or conversation. *Walsh v. McArdle*, 78 Hun, 411.

Thus a party cannot testify he did not see, or did not hear, a personal transaction with a certain deceased person. *Mulqueen v. Duffy*, 6 Hun, 299.

Also, in an action against the heirs of a deceased person for specific performance of a contract for the sale of land made with the deceased, wherein admissions of the plaintiff had been proved, showing that he agreed to pay thirty dollars an acre therefor, it was held that he could not, in his own behalf, answer the question, "Did you ever agree to pay thirty dollars an acre for the land?" *Chadwick v. Fonner*, 69 N. Y. 404; rev'g 6 Hun, 543.

Thus it was held that a witness could not testify that certain conversations did not take place between himself and the deceased. *Clarke v. Smith*, 46 Barb. 30. Or that no such transaction took place. *Dyer v. Dyer*, 48 Barb. 190. Or that the note was without consideration. *Benedict v. Driggs*, 34 Hun, 94.

Thus, in an action by an administrator upon a bond, the defendant was held to be precluded from testifying as to the amount of the consideration he received. *Stanley v. Whitney*, 47 Barb. 586. Also, that the plaintiff suing upon a note made by decedent could not testify that it had not been paid. *Howell v. Van Sicklen*, 6 Hun, 115; aff'd 70 N. Y. 595. Neither can the claimant upon a reference of a disputed claim testify that the note purporting to have been made by the decedent had never been paid, nor the interest. *Myer v. Hunt*, 38 St. Rep. 739; 14 Supp. 471. Nor can the vendor of goods testify, in an action to recover their price, that he has never been paid for them. *Braymen v. Stephens*, 79 Hun, 28. Also, in an action against an executor, where a demand for services rendered

to deceased was set up as a counterclaim, the plaintiffs were not allowed to answer the question, "Was it true it all had been paid?" *Williams v. Davis*, 7 Civ. Pro. 282.

In an action for money had and received by the defendant's intestate, where the defense was that the money had been placed in the hands of the deceased for the purpose of defrauding the plaintiff's creditors, it was held that he could not testify in his own behalf that he had not given the deceased the money for that purpose. *Tooley v. Bacon*, 8 Hun, 76; aff'd 70 N. Y. 34. See *Hard v. Ashley*, 117 N. Y. 606; rev'g 53 Hun, 112.

In an action to avoid a deed as to part of certain premises, it was held that the defendant could not be asked if he had stated that if the deed included the fifteen acres he would correct the mistake made by the deceased grantor. *Mills v. Mills*, 8 Supp. 811.

Where the mere fact that a party has had a conversation with a deceased person, to whom the opposite party stands in the relation specified in the section, is a material question, it is not competent for such party to testify that he had the conversation. *Maverick v. Marvel*, 90 N. Y. 656.

In an action to foreclose an equitable lien for unpaid purchase money of land sold by the plaintiff's father since deceased, the contract for which was assigned to the defendant by his deceased father, and the defense was payment, and the defendant testified to admissions made by the plaintiff that he had received payment by allowance of the amount on a sale of a contract by the defendant's father to plaintiff; it was held that this testimony did not permit the plaintiff to deny he had the transaction in question. *Brown v. Burgett*, 15 Supp. 942; 40 St. Rep. 564.

*Exceptions.* The rule above stated is, however, only a general rule, and is qualified by the further ruling of our courts, to the effect that when a party has given material testimony as to extraneous facts, which may or may not involve the affirmative or negative of the existence of personal transactions with the deceased, the adverse party may also testify to extraneous facts which tend to negative or affirm the existence of such transactions or conversations. *Lewis v. Merritt*, 98 N. Y. 206; *Pinney v. Orth*, 88 N. Y. 447; *Carney v. Wadhams*, 9 Civ. Pro. 204.

Thus, in an action brought by an executor for an alleged conversion of certain notes, and the plaintiff testified that such notes were kept by the deceased prior to her death in a trunk in her room, where he saw them the morning before she died, but could not find them the day after she died, and he also showed that the defendant was in the room of the deceased during her last hours. The notes were afterwards found in his possession, and he claimed them as a gift from the deceased. It was held that the defendant could answer the question, "Did you take these notes from any trunk or person?" *Lewis v. Merritt*, 98 N. Y. 206.

Also, when a hostile witness had testified that, after the death of the alleged donor, the donee stated she never had the notes in question in her possession, and had never received any interest upon them, the donee was held competent to deny such testimony, and also to state that at the time such notes were in her trunk in her bedroom. *Rix v. Hunt*, 16 App. Div. 541.

Also, when a witness had testified to certain interviews between the deceased and the defendant in his presence, it was held that the defendant could testify that the

witness was not present, and that the interviews in question did not take place where he had stated, but in another room. *Pinney v. Orth*, 88 N. Y. 447.

It has also been held that a party may testify to an intrinsic fact which tends to negative a personal transaction with the deceased, where no statement of the subject-matter is embraced in the question. *McKenna v. Bolger*, 49 Hun, 259 ; 17 St. Rep. 102. And it matters not whether the subject of the testimony ruled on is to prove a negative or affirmative. *Clark v. Smith*, 46 Barb. 30 ; *Dyer v. Dyer*, 48 Id. 190 ; *Stanley v. Whitney*, 47 Id. 586.

Thus, where a husband made a claim against the estate of his wife, it was held competent for him to testify to extraneous facts showing that he acted as her agent. That he might also show the payment of interest, taxes and other expenses relating to his wife's property, these being independent facts which his wife did not personally participate in. *Zinke v. Zinke*, 90 Hun, 127 ; 35 Supp. 645.

This rule applies, not only where a party is called in his own behalf, but also when called in behalf of another party. *Fox v. Black*, 61 Barb. 216.

§ 50. **Indirect evidence.** The rule laid down prohibiting the testimony as to transactions or conversations with decedents by persons disqualified under this section, cannot be evaded by the adoption of indirect methods to obtain the evidence desired. *Matter of Humfreville*, 6 App. Div. 535 ; 39 Supp. 550.

Thus, a witness cannot be asked if he was in the habit of borrowing money from the deceased. *Alexander v. Dutcher*, 7 Hun, 439 ; aff'd 70 N. Y. 385. Also held, that where executors were not competent to prove pay-



ment of the claim at issue, to the deceased, they could not testify to the fact that the deceased had no other sources of income than such payments. *Jaques v. Elmore*, 7 Hun, 675. Neither can the plaintiff testify as to who was the owner of the property in dispute, which was placed in the hands of defendant's intestate. *Tooley v. Bacon*, 8 Hun, 176 ; aff'd 70 N. Y. 34. Nor, in an action against executors, upon a bond alleged by the defendants to have been altered after its execution, can the plaintiff testify that he saw the bond in their attorney's hands before its execution, and it then contained the clause in question. *Pease v. Barnett*, 30 Hun, 525.

Where the defendant claimed that he had indorsed the note in suit as a mere surety for another, it was held he could not be asked the following questions, to substantiate his claim : "At the time you indorsed that note, or at the time you executed the bond and mortgage, did you receive anything for it ?" "Did you ever receive any money upon this note or mortgage or bond from anybody ?" *Auburn Savings Bank v. Brinkerhoff*, 44 Hun, 142. But he may be asked if he had ever seen the note. *Redfield v. Stitt*, 45 Hun, 592 ; 10 St. Rep. 366.

In an action to recover a balance due upon a land contract, brought by the administrators of the vendor against the administrators of the vendee, the defendant was held incompetent to testify that the vendor made no claim after the death of the purchaser for anything due on the contract. *Parks v. Andrews*, 56 Hun, 391. Also, in an action by administrators to recover money paid after the death of the intestate to the latter's daughter on checks drawn by them, she was held incompetent to answer questions as to whether her father ever promised

to pay certain money to her. *McMurray v. Innis*, 38 St. Rep. 489.

But it has been held that a widow, upon a reference of her claim against the estate of her husband, could be asked, "From the date of her marriage who provided the necessaries of the house, and who supported the family?" *Denise v. Denise*, 110 N. Y. 562; aff'g 41 Hun, 9; 18 St. Rep. 873.

In an action to recover bonds deposited by the plaintiff, with the indorsements thereon alleged to have been in blank, with the deceased assignor of the defendant, which appeared on the trial with the name of the defendant's assignor written in the blank, it was held that the plaintiff could not testify that he never transferred the bonds and never saw them after the deposit. *Hills v. Heermans*, 17 Hun, 470.

But also held that he might be asked, "At the time you left those bonds in the safe was the name of the assignor on either of the bonds, or anywhere on these instruments at the time?" *Wadsworth v. Heermans*, 85 N. Y. 639; aff'g *Hill v. Heermans*, 22 Hun, 455.

It was also held incompetent for a party to testify that he made a certain indorsement on the note before the delivery of the deed, that the last time he saw it before decedent's death was on a certain date, and that afterwards he found it in decedent's trunk. *Van Vechten v. Van Vechten*, 65 Hun, 215.

*Incidents of a transaction.* This prohibition not only covers transactions and conversations, but is also extended so as to include acts and incidents which may seem to be independent facts, but might establish indirectly the material fact sought to be established by showing what was done at the time of the interview between

the witness and the deceased. Neither, under such circumstances, can a witness testify to subsidiary facts, which originate in, or proceed from, such transactions. *Clift v. Moses*, 112 N. Y. 426 ; 21 St. Rep. 777 ; *Denise v. Denise*, 110 N. Y. 562 ; aff'g 41 Hun, 9.

Thus it has been held that a party cannot testify to the fact that he carried an inkstand with him to the interview. *Du Bois v. Baker*, 40 Barb. 556 ; aff'd 30 N. Y. 355. Nor can a party testify that he saw the deceased sign a paper. *Dunham v. Jayne*, 16 Abb. Pr. N. S. 317. Nor can a witness be asked, in denial of that allegation, if he put any property in the hands of the deceased for the purpose of defrauding his creditors. *Tooley v. Bacon*, 8 Hun, 176 ; aff'd 70 N. Y. 34. Nor that the articles in controversy were delivered at deceased's establishment. *Hay v. Muller*, 7 Misc. 670 ; 28 Supp. 57.

Where certain personal property was enclosed in a box and handed by the plaintiff to an intermediary to deliver it to defendant's testator, it was held that the plaintiff was not competent to testify to the specific articles in the box for the purpose of establishing delivery. *Gregory v. Fichtner*, 38 St. Rep. 192.

In an action to recover securities belonging to plaintiff which she had delivered to the defendant's intestate as her agent, a box in which she kept securities of which the plaintiff then made a list, and from which she was then able to state the amount, it was held that she was incompetent to state what the securities were. *Doolittle v. Stone*, 28 St. Rep. 319 ; 8 Supp. 605 ; 5 Silv. Sup. Ct. 412. Nor is it competent to testify to the address on a package sent to a person since deceased. *Stewart v. Patterson*, 37 Hun, 113. Nor, where the defense was pay-

ment, was the plaintiff allowed to testify that the receipt offered in evidence by the defendant has been changed since he gave it to defendant's intestate so as to make it a receipt in full instead of one on account. *Boughton v. Bogardus*, 35 Hun, 198.

*Independent facts.* This rule does not, however, preclude a witness from giving testimony to facts other than transactions with the deceased personally, which, as against the heirs at law, may tend to prove the existence and binding force of the contract at issue. *Card v. Card*, 39 N. Y. 317.

The rule seems to be now established that if the fact testified to is an independent one, no error is committed in its reception, although it may corroborate in some degree the evidence given involving a transaction between the witness and the deceased. *Tomlinson v. Seifert*, 2 St. Rep. 283.

Thus, where a husband claimed against his wife's estate for money expended by him for her, he was held competent to testify to extraneous facts showing that he acted as her agent. He was also permitted to show that he paid the interest, taxes and other expenses upon her buildings, these being independent facts in which his wife did not participate. *Zinke v. Zinke*, 90 Hun, 127 ; 35 Supp. 645.

Neither is collateral testimony relating to facts not dependent upon the evidence of the deceased party, but having a tendency to maintain the defense of the party from whom the evidence is proposed to be derived, included within this section. *Gilbert v. Sanders*, 10 St. Rep. 43.

Thus, in an action to recover the value of bonds delivered to the defendant's testator for safe keeping, the

plaintiff was allowed to testify to the exact number of bonds then owned by her. *Price v. Brown*, 5 St. Rep. 7.

Upon the trial of an action, where the principal contention was the ownership of a certain mare, the plaintiff proved that the intestate before his death showed the witness a paper which appeared to be a bill of sale to the defendant from the former owner, and another paper which appeared to be a bill of sale from the defendant to the deceased. It was held that the defendant could be asked whether he ever signed such a bill of sale. *Tunson v. Salisbury*, 15 App. Div. 215.

It has also been held that a party might testify that she had the custody of a deed executed by the deceased, both before and after its acknowledgment, and down to the time of trial, where the delivery of the deed was the question at issue. *Viall v. Leavens*, 39 Hun, 291. Also, that an interested party could testify that he saw the deed at issue in the desk of the deceased. *Blaesi v. Blaesi*, 42 Hun, 159.

It has also been held that a party might testify to the simple fact that a conversation was had with a deceased person, without giving any details of the conversation, it not being obnoxious to the statute, unless the mere fact that a conversation took place is the material fact to be proved. *Hier v. Grant*, 47 N. Y. 278.

Also where an action was brought to set aside certain conveyances of the deceased grantor, it was held that the defendant might be asked how long one of the deeds had been in his possession. *Spicer v. Spicer*, 54 N. Y. Supr. 280.

Also held, that a party might testify that on a certain occasion he drove his team to the house of the plaintiff's intestate. *Crowley v. Davis*, 4 Week. Dig. 466. Also,

a son was allowed to testify that he saw the deceased on a certain day at a certain place, where it was claimed he made a payment at that time on the account at issue. *Matter of Brown*, 38 St. Rep. 130.

§ 51. **Proceedings under the will.** The prohibitions of this section apply to, and are in favor of, an executor who offers a will for probate. *Schoonmaker v. Woolford*, 20 Hun, 166. Thus, a specific and residuary legatee cannot testify on the probate of a will in behalf of the contestants, who seek to set aside a codicil thereof as to conversations or transactions of the decedent with witness and others in his presence when the result of the establishing of said codicil would diminish the amount he would otherwise receive. *Will of Dunham*, 121 N. Y. 575; aff'g 15 St. Rep. 869. But such legatees may be called and examined as to such matters by a contestant of the will, as in such case the witness is not examined in his own behalf or interest since his interest is to have the will sustained. *Matter of Potter*, 17 App. Div. 267; *Albany County Savings Bank v. McCarty*, 149 N. Y. 71, 84.

Also, where a person has been named as a legatee on condition that he perform certain services of a religious character, he is disqualified under the statute from testifying to conversations with the deceased. *Matter of Burke*, 5 Redf. 369. Also, a legatee of the income for life, the principal to go to her heirs, cannot testify to any conversation with deceased tending to diminish the legacy, by proving advances made during the lifetime of the testator. *Benjamin v. Dimmick*, 4 Redf. 7. But a beneficiary under the will may testify to the execution of a codicil thereto, where the codicil has made no change in her interests and rights in the estate. *Matter*

of *Clark*, 82 Hun, 341; 31 Supp. 476; 64 St. Rep. 85.

Nor can a legatee called as a witness for a contestant be asked a question which calls for an answer which will disclose a personal transaction with the decedent. *Will of Stewart*, 24 St. Rep. 322. Nor can a proponent of a will and a beneficiary under it testify that he heard it read over to the deceased. *Matter of Hopkins*, 6 St. Rep. 390. Nor, in a contest of a will on the ground of fraud, can a beneficiary thereunder testify to a conversation he heard, in which he took no part, between the deceased and an attesting witness. *In re Bernsee*, 141 N. Y. 387; 57 St. Rep. 601. Neither can a beneficiary or devisee testify in behalf of the proponent of a will. *Matter of O'Neil*, 26 St. Rep. 242; *Lee v. Dill*, 39 Barb. 516.

A plaintiff, in an action to establish a lost will against the administrators and next of kin, cannot testify to a conversation had between himself and the deceased at the time of the execution of the will and before on that subject. *Simon v. Cloffy*, 45 Barb. 438; aff'd 41 N. Y. 619. Nor can she testify that it was exhibited to her by the deceased, and that she read it in his presence. *Keery v. Dimon*, 37 Supp. 92; 72 St. Rep. 125.

Also, where the probate of a will was opposed by a stranger in blood to testatrix, but who claimed under a former will, he was held to be an interested person within the statute. *Matter of Smith*, 96 N. Y. 516. A subscribing witness to a will is not competent to prove its execution, when he did not see the signature of the testatrix thereon. *Matter of Landy*, 148 N. Y. 407; 14 App. Div. 160; 43 Supp. 689; 77 St. Rep. 689; *Matter of Mackay*, 110 N. Y. 611; *Lewis v. Lewis*, 11 N. Y. 220.

It was also held a reversible error to allow the wife of the testator, who had acted as his interpreter, the testator being paralyzed so as to deprive him of speech, to testify on the probate of his will, as to the wishes, intentions and directions of the deceased as expressed through her, she being a legatee, devisee and sole executrix under said will. *Lane v. Lane*, 95 N. Y. 495.

Also held error, on such proceedings, to permit the executor, who presented the will for probate, and was the principal legatee, after proving the loss of a former will, to testify to its contents, and state that a memorandum made by him was produced at an interview between himself and the decedent, and that from it the other will was drawn by him. *Matter of Smith*, 95 N. Y. 516.

But an executor's right to commissions as such does not render him incompetent by reason of interest. *Matter of Wilson*, 103 N. Y. 374; 3 St. Rep. 613.

On the probate of a will, the daughter cannot testify to personal transactions or conversations with her father. *Matter of Lasak*, 31 St. Rep. 203; 10 Supp. 80; 131 N. Y. 624. It has also been held that she is not restored to competency by withdrawing as a contestant, and withdrawing her appearance therein. *Id.*

Nor can a daughter, where she is an interested party, testify to a conversation between the testator and his wife in which she took no part. *In re Palmateer*, 78 Hun, 43. Nor can she testify that she has not received money which the will states she has, no other evidence of the gift having been produced. *Doughty v. Doughty*, 5 St. Rep. 95.

A widow, who would have an inchoate right of dower in the property were the will declared void, cannot testify



on probate proceedings to transactions or conversations with the testator. *Steele v. Ward*, 30 Hun, 555. But the wife of a son of decedent can so testify in such proceedings, her contingent dower in her husband's estate should the will be refused probate being considered an interest too remote. *Estate of Scherrer*, 22 Daily Reg. No. 4.

It is the general rule that, upon probate proceedings, contestants are incompetent to testify to personal transactions or communications with the deceased, by reason of interest. *Matter of O'Neil*, 26 St. Rep. 242; *Matter of Berrien*, 24 Id. 332; *Schoonmaker v. Wolford*, 20 Hun, 166; *Snyder v. Sherman*, 23 Id. 139. Although legatees cannot, generally speaking, testify to such matters upon probate proceedings, yet they may do so, if they have executed a valid release of all their interest in the estate in question. *Loder v. Whelpley*, 111 N. Y. 239; 19 St. Rep. 631; 16 Civ. Pro. 89; 1 Dem. 368. But the disability is not removed when the party executing such release proposes to give such testimony in behalf of such successor to such interest. *O'Brien et al. v. Weiler*, 140 N. Y. 281; 55 St. Rep. 637.

§ 52. **Objections to witness.** The incompetency of a witness cannot be inferred or presumed, it must be made out by the party alleging it. *Steele v. Ward*, 30 Hun, 555.

Objections to the reception of incompetent testimony must be made at the time the same is offered, and the grounds thereof must be specifically stated. Much confusion seems to have arisen as to the manner and words in which this objection should be couched, arising from the apparent conflict of authorities upon this point.

Thus it would seem that no objection would hold unless

this section of the Code was specially referred to as the ground of objection. *Cross v. Smith*, 85 Hun, 49 ; 32 Supp. 671 ; *Somerville v. Crook*, 9 Hun, 664 ; *Stevens v. Brennan*, 79 Hun, 254 ; *Sanforth v. Ellithorpe*, 22 Week. Dig. 829 ; *Levin v. Russel*, 42 N. Y. 251 ; *Williams v. Sergeant*, 46 Id. 481 ; *Quinby v. Strauss*, 90 Id. 664.

On the other hand, it has been held that an objection that the witness is not competent under section 829 of the Code is not sufficient, as being too general. *Ham v. Van Orden*, 84 N. Y. 271.

A careful examination of these authorities will generally show that the real ground for holding the objections insufficient was that the objections were too general, not that the particular section was not mentioned. An objection must be so made, and so expressed, that the real ground thereof is clearly understood by the court, and if this is the case, the phraseology is not important. This view of this much-discussed point seems to be completely borne out by the later decisions, which hold that it is not necessary to specifically refer to the section under which the objection can be sustained, but it will be sufficient to base the objection upon the ground that the question calls for testimony relating to personal transactions or conversations with the deceased and an interested witness. *Sanforth v. Ellithorpe*, 95 N. Y. 48 ; *Boughton v. Bogardus*, 7 Civ. Pro. 252.

Where the court has erred in receiving incompetent evidence, which was properly objected to, the error can only be disregarded in appeal, when it is clearly seen that its reception did no harm. *Foote v. Beecher*, 78 N. Y. 155 ; *Hobart v. Hobart*, 62 Id. 80 ; *Schoonmaker v. Wolford*, 20 Hun, 166.

Nevertheless, even if the objection raised to the reception of this evidence is too general to grant a reversal if the court overrules the same, yet should the court sustain it, that ruling will be sustained on appeal, under this section. *Tooley v. Bacon*, 70 N. Y. 34.

It has been held that an objection to the declarations of a parent as to legitimacy of issue upon the ground of hearsay does not raise the question of incompetency under this section. *Bell v. Bumsted*, 34 St. Rep. 393 ; 14 Supp. 697.

Also, where, upon a trial, the intestate's son, who was entitled to a share in the estate, gave testimony which in part related to personal transactions with decedent, and partly to other matters, his testimony was objected to as incompetent, but the objection was held to be too general to raise any question upon appeal. *Riggs v. Am. H. Soc.* 35 Hun, 656.

An objection to the testimony should be made when the same is offered. It is a reversible error in the court to refuse to allow an interested witness to be sworn, either as a witness in his own behalf, or in behalf of one of the parties to the action. The prohibitions of the statute extend only to the testimony, and it may be that he could have given evidence of facts which would have changed the issue. *Card v. Card*, 39 N. Y. 317 ; *Ham v. Van Orden*, 84 N. Y. 257 ; *Sanforth v. Ellithorpe*, 95 Id. 48 ; *Hoar v. Hoar*, 23 Hun, 33 ; *Riggs v. Am. H. Soc.*, 35 Id. 656.

The usual practice is to allow the witness to give his testimony until it appears that his evidence comes within the rule, and then make the objection.

As stated already, the objection must be made when the incompetent testimony is given, and not before.

Therefore, even though the objection was couched in proper form, yet if it was made before the witness had been sworn, and not made again thereafter, it will not avail. *Hoar v. Hoar*, 23 Hun, 33. It has been held, however, that if an objection to incompetent testimony has once been properly made, it is not necessary to renew the objection and exception each time testimony is given by the same witness, or others bearing the same relations toward the deceased. *Hobart v. Hobart*, 62 N. Y. 80; *Schoonmaker v. Walford*, 20 Hun, 166.

Unless the objection to such testimony is made at the proper time, a motion afterwards made, to strike out the objectionable evidence as incompetent as within the prohibition of the statute, may not remedy the omission. *Cross v. Smith*, 85 Hun, 49; 32 Supp. 671; *Hoyt v. Hoyt*, 112 N. Y. 493.

On this point the court says: "It is entirely clear that a party who has sat by during the reception of incompetent evidence, without properly objecting thereto, and thus taken his chance of advantage to be derived by him therefrom, has not, when he finds such evidence prejudicial to him, a legal right to require the same to be stricken out." *Levin v. Russel*, 42 N. Y. 251.

This, however, seems to be largely a matter discretionary with the trial court, and its exercise of discretion thereon will not as a rule be disturbed on appeal.

The court says upon this subject: "Usually the objection must be made when the incompetent evidence is offered, and this is the rule as to all incompetent evidence. But if the objection be not made at the time, and the omission is shown to have been from mistake or misunderstanding, the trial court may permit it to be made at any time before the close of the trial, by a motion to

strike out the incompetent evidence. This is not uncommon practice in the trial of cases. When the objection is not made at the time the evidence is offered or given, it is in the discretion of the trial judge to permit it to be made at a later stage of the trial. That discretion should be carefully exercised, so that no harm will come to the other party ; and it should be exercised when it is just that the incompetent evidence should be excluded, and no harm done to the opposite party from the delay in making the objection." *Miller v. Montgomery*, 78 N. Y. 286 ; *Matter of Burke*, 5 Redf. 369.

Thus, where a witness for the plaintiff gave evidence of a conversation with the decedent, which went to aid the plaintiff, and the latter subsequently put in evidence assignments of the claim in question to him from the witness, it was held that a motion to strike out the testimony should have been granted. *Campbell v. Hubbard*, 16 Week. Dig. 29.

But on an unfriendly accounting against an administrator, his testimony of transactions and conversations with the decedent called out by the moving party, it was held that the same could not be stricken out at the latter's request. *Crowe v. Brady*, 5 Redf. 1. Also held, that on a commission to examine a party before trial, interrogatories should not be stricken out as inadmissible, when it is not certain that objections to them would be raised upon the trial. *Wilcox v. Dodge*, 53 Hun, 565.

Unless the objection is raised upon the trial of the action, the question will not be considered upon an appeal. *Sacia v. Decker*, 1 Civ. Pro. 47 ; aff'd 1 Id. 54 ; 10 Daly, 204.

If the original question asked the witness does not disclose the incompetency of the testimony, he may be cross-

examined in regard to his answer without the cross-examining party waiving his objection. *Mills v. Kernochan*, 3 St. Rep. 152. Also, where incompetent testimony has been received against the objection of the opposite party, the latter may cross-examine the witness as to the transaction. *White v. White*, 16 Week. Dig. 45.

The surety upon the bond of a non-resident executor is so interested in the event of an accounting of his principal, as to render him incompetent under the statute, to testify to personal transactions with the deceased on behalf of the executor, but the fact that the objectors to the accounting called him to testify to other matters to which he was competent to testify was held not be a waiver of their rights to object to the calling out of incompetent evidence upon cross-examination. *Miller v. Montgomery*, 78 N. Y. 282; *Boston v. Scramling*, 31 Hun, 467.

The fact that the cross-examination of the witness involved also details relating to transactions with the deceased, generally stated upon his direct examination, does not preclude the cross-examining party from moving to strike out the whole testimony as incompetent under the statute. *Kerr v. McGuire*, 28 N. Y. 446, 452.

§ 53. **Competency restored.** There are certain exceptions to the rule regarding the incompetency of witnesses under this section. The statute itself designates some of the relaxations thereof in this respect, stating that the rule does not apply when "the executor, administrator, survivor committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication." Section 829 of the Code of Civil Procedure; *Rogers v.*

*Rogers*, 153 N. Y. 343 ; *Kelly v. Burroughs*, 33 Hun, 349 ; aff'd 102 N. Y. 493 ; *Smith v. Christopher*, 3 Hun, 585 ; *Sweet v. Low*, 28 Id. 432 ; *Clark v. Bruce*, 12 Id. 247 ; *Markel v. Benson*, 55 How. Pr. 360 ; *Shepherd v. Patterson*, 3 Dem. 183.

Thus, where an executor had alleged ownership in a certain bond found in the testator's trunk, and the widow testified to the declarations of the deceased as to ownership in himself. The executor produced two written declarations signed by the testator concerning the matter, which were held competent upon the ground that the party in interest had testified to the declarations of decedent. *Smith v. Christopher*, 3 Hun, 585. Also, where the executor had testified in his own behalf that he had called upon the trustee of the alleged trust and demanded the money received by him from the testator, and that the trustee then admitted the delivery of the same to him by the deceased, the trustee was held competent to testify as to what the real transaction was with the deceased, and not what it appeared to be, from that portion of it which was related by the executor. *Todd v. Vaughan*, 90 Hun, 70 ; 69 St. Rep. 861 ; 35 Supp. 457.

Also, where the administrator brought suit against a physician for causing the death of the intestate, and the plaintiff, together with the wife and daughter of the deceased, were examined in behalf of the plaintiff as to what occurred at defendant's visits to the deceased, the defendant was also allowed to testify to what occurred. *Markell v. Benson*, 55 How. Pr. 360.

Where an interested party testifies to declarations of the deceased, kindred declarations have been held admissible. *Marsh v. Brown*, 18 Hun, 319.

But the fact that an executor, administrator or others

have testified to one transaction with the deceased does not render the other party competent to testify to other transactions, but he must be limited to the matters testified to by the others. *Trimmer v. Trimmer*, 90 N. Y. 675 ; *Rogers v. Rogers*, 153 N. Y. 343 ; *Chadwick v. Fonner*, 69 N. Y. 404 ; *Rogers v. McGuire*, 90 Hun, 455 ; 37 Supp. 76 ; 72 St. Rep. 87 ; *Ward v. Plato*, 23 Hun, 402 ; *Hammond v. Schultze*, 45 Supr. 611 ; *Gardner v. Hirsch*, 37 Id. 503 ; *Petit v. Geesler*, 58 How. Pr. 195.

Thus, where the administrator testified to certain admissions made by the defendant regarding the terms of a certain contract between him and the deceased, on which the action was founded, the other party was held incompetent to testify as to the terms of the contract so claimed to be admitted. *Chadwick v. Fonner*, 69 N. Y. 404 ; rev'g 6 Hun, 543 ; *Contra, Markell v. Benson*, 55 How. Pr. 360.

Where a surviving partner testified that a bill had not been paid, it was held that the defendant could not testify that he had paid it to the deceased partner. *Petit v. Geesler*, 58 How. Pr. 195. Also, in an action by a surviving partner, for goods sold by the firm, where he testified to the negotiations between himself and the defendant, and stated that the actual sale was made by his deceased partner, the defendant was not allowed to give any testimony as to what took place between himself and the deceased at that time. *Goodwin v. Hirsch*, 37 Super. 503.

Where the question was as to an agreement made between the plaintiff and the deceased, as to the payment of certain land bought by the defendant, who gave evidence of certain declarations of the plaintiff that he had made such an agreement, the plaintiff was not



allowed to deny that he had so agreed with the decedent. *Chadwick v. Fonner*, 69 N. Y. 404.

Also, where the executor, the plaintiff, was examined as a witness as to the language used by the defendant in asserting a claim for unpaid rent, it was held that this did not authorize an examination of the defendant in his own behalf to show what the agreement of hiring with deceased was. *Hammond v. Schultze*, 45 Supr. 611.

Where the party representing the deceased, as a witness in his own behalf, has given material testimony, the adverse party, although precluded from directly proving the existence of a transaction or communication with deceased, may yet testify as to extraneous facts tending to controvert such evidence given, although such facts may incidentally tend to establish the inference that such a transaction or conversation has, or has not, taken place. *Lewis v. Merritt*, 98 N. Y. 206. See, also, 113 N. Y. 386 ; *Pinney v. Orth*, 83 N. Y. 447.

Neither is the door opened to an adverse party for the admission of such testimony, from the fact that proof of such matters was made by a competent third party. *Lyon v. Ricker*, 56 St. Rep. 804 ; 141 N. Y. 225. Nor does the testimony of a disinterested witness remove the bar to admit testimony of an interested person as to the same transactions. *Hard v. Ashley*, 44 St. Rep. 792 ; 18 Supp. 413.

But the mother of a beneficiary under the will may testify as to such matters. *In re Bellows*, 22 Supp. 290 ; 51 St. Rep. 782.

Where evidence of a deceased plaintiff in a former trial is given upon the second in behalf of the representatives, the defendant may contradict, correct or supplant

the same as to anything which occurred at the transaction or interview in question. *Potts v. Mayer*, 86 N. Y. 302; *Robbins v. Pullz*, 48 Supr. 510. But the testimony of the deceased on another trial, brought upon other causes of action, does not render such evidence competent. *Wood v. Holmes*, 19 Week. Dig. 471.

*Effect of cross-examination.* Another exception to the rule of incompetency may arise from the cross-examination of a witness or party.

Where a party on cross-examination elicits a partial disclosure of a transaction not open to proof by his adversary, he thereby admits the other on the re-direct examination to explain the same and also to detail the complete transaction. *Merritt v. Campbell*, 79 N. Y. 625; *Howe v. Schweinberg*, 23 Supp. 657; 4 Misc. 73.

But where a party who is himself excluded from testifying to certain matters draws, upon cross-examination of the adverse party, testimony in regard to those transactions, this does not allow him to testify as to such prohibited facts nor contradict them; as in such a case the adverse party is not deemed to have been examined in his own behalf within the meaning of the statute. *Corning v. Walker*, 28 Hun, 435; aff'd 100 N. Y. 547; *Miller v. Adkins*, 9 Hun, 9.

But where the plaintiff called the defendant, who testified to having written letters in which he stated that his father had given him money, the defendant may on cross-examination explain the character of the gift, to show that it was not an advancement. *Sanford v. Sanford*, 5 Lans. 486.

*Effect of release.* Legatees or interested parties, while generally prohibited from testifying as to conversations or transactions with the deceased, yet are permitted to

do so, if they have executed a valid release of all their interest in the estate. *Loder v. Whelpley*, 111 N. Y. 239 ; 19 St. Rep. 631 ; 16 Civ. Pro. 89 ; 1 Dem. 368.

But the disability is not removed when the release is by one of two plaintiffs, the effect of which is to vest the interest released in his co-plaintiff. *O'Brien v. Weiler*, 140 N. Y. 281 ; 55 St. Rep. 637. Nor when the releasee proposes to testify in behalf of such successor in interest. *Id.*

A release of the interests of a proposed witness in the estate in question, which names no releasee and is not shown to have been delivered to any one, is insufficient to qualify an incompetent witness. *Matter of Torrington*, 79 Hun, 128 ; 61 St. Rep. 426.

§ 54. **Under section 830.** As section 830 of the Code of Civil Procedure seems to naturally be used in connection with section 829, it is deemed proper to insert it here.

This section provides that : “ Where a party (or witness) has died or become insane since the trial of an action, or the hearing upon the merits of a special proceeding, the testimony of the decedent (or insane person), or any person who is rendered incompetent by the provisions of the last section, taken or read in evidence at the former trial or hearing, may be given or read in evidence at a new trial or hearing by either party, subject to any other legal objection to the competency of the witness, or to any legal objection to his testimony or any question put to him. The original stenographic notes of such testimony, taken by a stenographer who has since died or become incompetent, may be so read in evidence by any person whose competency to read the same accurately is established to the satisfaction of the court.”

To authorize the testimony to be used under this statute, the parties must have been parties in the prior suit, the issue must be the same, the testimony offered the whole testimony, and the right to cross-examination must have existed. *People ex rel. v. Brugman*, 3 App. Div. 155 ; *Morehouse v. Morehouse*, 41 Hun, 146 ; 11 Civ. Pro. 20 ; 3 St. Rep. 790 ; *Varnum v. Hart*, 47 Hun, 18 ; 14 St. Rep. 140 ; *Vail v. Craig*, 13 St. Rep. 549 ; 10 Supp. 101 ; *Odell v. Solomon*, 16 St. Rep. 577 ; 4 Supp. 400 ; 55 Supr. Ct. 410 ; *Miller v. McGucken*, 20 Week. Dig. 429 ; *Bradley v. Merrick*, 25 Hun, 272 : aff'd 91 N. Y. 293.

Also held, that the same ruling applies where the jury disagreed upon the former trial. *Lawson v. Jones*, 12 Week. Dig. 551 ; 61 How. Pr. 421 ; 1 Civ. Pro. 247.

Where both the plaintiff and defendant had been examined in an action before trial, under a stipulation, and the defendant thereafter died, and the action was continued against his executor, it was held that the plaintiff's deposition could be read in evidence, although relating to personal transactions with the deceased. *MacDonal v. Woodbury*, 30 Hun, 35 ; 3 Civ. Pro. 337.

Where the plaintiff had given testimony on the trial, but before it was completed one of the defendants died, it was held that such occurrence did not authorize the striking out of plaintiff's testimony. *Comins v. Hetfield*, 80 N. Y. 261 ; aff'g 12 Hun, 375. Also, that the testimony of a party, taken before trial, at the instance of his adversary, is admissible at the trial, notwithstanding the subsequent death of the adversary before trial. *Rice v. Motley*, 24 Hun, 143.

Where, upon the first trial, the husband of the contestant testified, and before the second trial the contestant

died, it was held that it was competent to read the husband's testimony upon the second trial. *Matter of Budlong*, 54 Hun, 131 ; 26 St. Rep. 863 ; 7 Supp. 289.

But in an action to recover for damages for an injury, the plaintiff's testator was examined in his own behalf before trial. While the action was pending he died, and the action was brought by his executor. It was held that the deposition could not be read in evidence against the objection of the defendant. *Murphy v. N. Y. C. & H. R. Co.*, 30 Hun, 358.

Also held, that the deposition of a deceased wife, in an action against her husband, was not competent evidence in proceedings relative to the custody of their child, upon the question of the fitness of the husband to its custody. *People ex rel. v. Brugman*, 3 App. Div. 155.

## CHAPTER V.

### PRIVILEGED COMMUNICATIONS.

- Sec. 55. Preliminary.
- 56. Communications to an attorney.
- 57. What relations must exist.
- 58. Cessation of relations.
- 59. Objections to testimony.
- 60. Who decides as to relationship and privilege.
- 61. What communications are privileged.
- 62. What communications are not privileged.
- 63. On probate of will.
- 64. Waiver.
- 65. Communications to physician.
- 66. What are privileged.
- 67. What are not privileged.
- 68. Probate proceedings.
- 69. Objections to testimony.
- 70. Waiver.
- 71. Communications to clergymen.

§ 55. **Preliminary.** There is a certain specified class of persons, the members of which, from the peculiar relations which must necessarily exist between them and persons seeking their aid, counsel or advice, are prohibited from making public any confessions, admissions or communications made to them, or any information derived by them, from such persons, which are made, or gathered, while the specified confidential relations existed between the parties, which tend to the injury of their informants, or affect adversely their interests. Among the persons whose lips are thus sealed by statute are attorneys, physicians, clergymen and husbands and wives.

§ 56. **Communications to attorneys.** “An attorney or counsellor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment; nor shall any clerk, stenographer or other person employed by such attorney or counsellor be allowed to disclose any such communications or advice given thereon.” Code of Procedure, § 835.

It has been held that this section applies to testamentary cases. *Mason v. Williams*, 53 Hun, 398. Also, that advice given by a corporation counsel to officers or boards of a city government is privileged. *People v. Gilon*, 18 Civ. Pro. Rep. 109; 9 Supp. 243. This rule also applies to statements and declarations made during consultations. *Smith v. Smith*, 1 T. & C. 63.

But it has been held that communications made by a client to his attorney, for the purpose of obtaining professional advice or assistance as to the commission of a crime, are not privileged. *People v. Blakeley*, 4 Park, 176; *Bank, etc., v. Mesereau*, 3 Barb. Ch. 598; *Coveny v. Tannahill*, 1 Hill, 33.

This statute was not enacted for the benefit of the attorney, nor is it a privilege which, strictly speaking, belongs to him, although he may exercise it. The benefits of this act are for the client only, by whom such information has been imparted, or to whom the advice has been given. *Hoyt v. Jackson*, 3 Dem. 368.

This rule may be said to be of universal observance, and is based upon the ground that every client should have perfect freedom in consulting with his legal adviser. In all courts, therefore, a seal is placed upon a lawyer's lips as to all such transactions between himself

and clients, whether of words, deeds or acts, unless the client himself consents to the disclosure. *Root v. Wright*, 84 N. Y. 72; rev'g 21 Hun, 344; *Carner v. Platt*, 15 Abb. N. S. 337; 36 Supr. Ct. 361; *Yates v. Olmstead*, 56 N. Y. 632; *Bacon v. Frisbie*, 80 N. Y. 394; *Britton v. Lorenz*, 45 N. Y. 51; *State v. Dawson*, 90 Mo. 149; *Parker v. Carter*, 4 Mun. (Va.) 273; *Crawford v. McKissock*, 1 Port. (Ala.) 433; *McLellan v. Longfellow*, 32 Me. 494; *Chew v. Farm. Bank*, 2 Md. Ch. 231; *Foster v. Hall*, 12 Pick. (Mass.) 89; *State v. Hazleton*, 15 La. Ann. 72; *Satterlee v. Bliss*, 39 Cal. 489; *Milen v. State*, 24 Ark. 346; *Pierson v. Steortz*, 1 Mon. (Iowa) 136; *Jenkinson v. State*, 5 Blackf. (Ind.) 465. This rule is not confined in its operation to communications made in contemplation of a suit, but extends to any matter which is the proper subject of professional employment, and so connected with the employment as attorney or counsel as to afford a presumption that it was the ground of the address by the client. *Root v. Wright*, 84 N. Y. 72; rev'g 21 Hun, 344; *Bacon v. Frisbie*, 80 N. Y. 394; mod'g 15 Hun, 26; *Yates v. Olmsted*, 56 N. Y. 632; mod'g 65 Barb. 43; *Britton v. Lorenz*, 45 N. Y. 51; aff'g 3 Daly, 23; *Carner v. Platt*, 15 Abb. N. S. 337. The fact that this advice is given gratis has no effect upon this rule. *March v. Ludlow*, 3 Sandf. Ch. 351. Neither is it necessary that the communications between them should have had reference to any particular suit. *Gage v. Gage*, 13 App. Div. 565; 43 Supp. 810; 77 St. Rep. 810.

This privilege is also by this section extended so as to include all such communications or transactions between the client and the attorney's clerk. Code Civ. Pro. § 835; *Sibley v. Waffle*, 16 N. Y. 180; *Brand v. Brand*, 39 How.



Pr. 193 ; *Jackson v. French*, 3 Wend. 337 ; *Sandberger v. Gorham*, 5 Cal. 450.

It has also been held that an agent and the interpreter who acts between the attorney and his client come within the statute. *Jackson v. French*, 3 Wend. 337 ; *Parker v. Carter*, 4 Mun. (Va.) 273.

It has been held both ways as to whether this rule covers one employed as counsel who has in fact not been duly licensed to practise law, but is merely a practitioner in justices' courts. *Benedict v. State* (Ohio), 11 N. E. Rep. 125 ; *Temple v. Frost*, 10 Iowa, 266.

A person merely studying law in a lawyer's office seems to be without this rule. *Barnes v. Harris*, 7 Cush. 576.

If others overhear such privileged communications between the client and attorney, they are competent witnesses. *People v. Barker*, 60 Mich. 277 ; *Goddard v. Gardner*, 28 Conn. 172. Thus the jailer has been allowed to give testimony as to what he heard a prisoner tell his counsel concerning the case. *Cotton v. State*, 87 Ala. 75.

But a scrivener, as the term is used in the United States, does not come within this rule. *De Wolfe v. Strades*, 26 Ill. 225 ; *Barum v. Fonts*, 15 Ind. 50 ; *Coon v. Swan*, 30 Vt. 6 ; *Semple v. Frost*, 10 Iowa, 266.

The fact that certain correspondence between an attorney and his client had been admitted in evidence upon a former trial, in violation of this rule, does not justify a repetition of the error upon a subsequent re-trial. *Fire Assn. v. Flemming* (Ga.), 3 S. E. Rep. 420.

§ 57. **What relations must exist.** Before a privilege upon this ground can be claimed, it must clearly appear that the relations of attorney and client existed between

the parties at the time, and that the communication was confidential and so regarded. *Althouse v. Wells*, 40 Hun, 336 ; *Bogert v. Bogert*, 2 Edw. Ch. 399 ; *Rochester City Bank v. Suydam*, 5 How. Pr. 254 ; *Marsh v. Howe*, 36 Barb. 649 ; *Sharon v. Sharon*, 79 Cal. 633 ; *Brown v. Matthews* (Ga.), 4 S. E. Rep. 13. And the burden of proving such relationship rests upon the party striving to suppress the evidence. *Renihan v. Dennin*, 103 N. Y. 573 ; aff'g 38 Hun, 270 ; *Rousseau v. Bleau*, 131 N. Y. 177 ; *Sharon v. Sharon*, 79 Cal. 633.

A formal retainer is not necessary to constitute this relationship. *Gage v. Gage*, 13 App. Div. 565 ; 43 Supp. 810 ; 77 St. Rep. 810.

It has been held that even where the attorney did not understand he was acting as such, yet if the communications were made to him in good faith, they were privileged. *Aldermen v. People*, 4 Mich. 414.

It has also been held that where a prisoner supposed that he was dealing with one who was to act as his attorney, and in reliance upon that fact makes to him confidential communications, such communications are privileged irrespective of the fact whether such person who assumed so to act was an attorney or not. *People v. Barker*, 60 Mich. 277 ; *People v. Stewart*, 75 Mich. 21.

But a simple inquiry of an attorney as to the existence of a matter of fact in which the inquirer is interested, does not create such a relation, nor prevent the attorney from testifying to what took place between them. *Plane Manuf'g Co. v. Trawley* (Wis.), 32 N. W. Rep. 768.

§ 58. **Cessation of relations.** The cessation of the relation of attorney and client does not give the former liberty to divulge the former confidential communications which may fairly be said to have been induced by

the previous relationship. *Meyers v. Dorman*, 34 Hun, 115 ; 20 Week. Dig. 111 ; *Morris v. Cain* (La.), 1 S. Rep. 797.

Neither can a former attorney for a party be required by his former client's opponent to produce papers, without that client's consent. *Estate of Hoyt*, 7 Civ. Pro. Rep. 374.

But also held, that one who had on former occasions sustained the relation of attorney to a party since accused of a crime may disclose confidential communications made by the accused to him, after he had refused to act for the former in that case. *People v. Hess*, 8 App. Div. 143 ; *Mandeville v. Guernsey*, 38 Barb. 225.

Also, where an attorney informed one to whom he stood in the relation of attorney in regard to certain pending matters, that he could not advise with him in reference to a note in suit, as, had he been employed by the opposite side, statements made thereafter to him by such person were held not privileged. *Plane Manuf'g Co. v. Trawley* (Wis.), 32 N. W. Rep. 768.

On the other hand, where such relations did exist as to bring the communications within the statute, the death of the client does not unlock the attorney's lips, but the statute may be invoked by the executor. *Pearsall v. Elmer*, 5 Redf. 181.

§ 59. **Objections to the testimony.** Where objection under the statute is made to the reception of testimony by an attorney, which also includes testimony which was competent, the objection is too broad. *Brennan v. Hall*, 20 Civ. Pro. Rep. 434 ; 39 St. Rep. 130 ; 14 Supp. 864.

But an action upon a promissory note, after an attorney had testified to declarations made by the transferee of the note, it appeared upon his cross-examination

that he was acting as counsel for the transferee at the time such declarations were made and that they were made to him as such. It was held error to refuse to strike out the testimony. *Loveridge v. Hill*, 96 N. Y. 222.

§ 60. **Who decides as to relation and privilege.** When an attorney denies that he sustained the relation of attorney to the party seeking to exclude his evidence under the statute, the court decides from the facts appearing whether he did or did not occupy such professional capacity. *Bacon v. Frisbie*, 80 N. Y. 394.

Where an attorney refused to testify to confidential communications between himself and client, based upon his opinion under oath that the transaction was such as he was privileged from testifying to, he was held to be properly sustained in his refusal. *McClure v. Goodenough*, 19 Civ. Pro. Rep. 191 ; 12 Supp. 459. It has also been held that the attorney cannot judge for himself if a document called for is privileged or not, but must produce it for inspection of the court. *Mitchell's Case*, 12 Abb. 249.

§ 61. **What communications are privileged.** Of course all communications or transactions which occur between a lawyer and his client are not privileged, but from their peculiar nature certain of them are so deemed. Thus a counsel cannot be compelled to testify as to proof of claim in bankruptcy. *Lockwood v. House*, 49 Supr. Ct. 500 ; aff'd 101 N. Y. 647. Also, where the accused were charged with stealing articles among which were "one hundred and sixty dollars of current silver coin of the United States," it was held error to allow their attorney to testify that they paid him as a retainer forty-five dollars in silver and five dollars in gold. *State v.*

*Dawson*, 90 Mo. 149. Also, he cannot testify that his client executed a deed which he attested. *Rousseau v. Bleau*, 38 St. Rep. 221.

The prohibition includes instructions given to an attorney relating to the drawing of a will, and to conversations had with that attorney to enable him to carry out those instructions. *Matter of Coleman*, 111 N. Y. 220 ; rev'g 1 Dem. 368. And this too although the attorney asked no questions and gave no advice. *Id.*

The same rule applies to communications by word or act of a client to an attorney employed to draw a deed, and also to counsel upon that subject, and cannot be given in evidence by the attorney in an action between the grantor and a third person. *Barry v. Coville*, 53 Hun, 620 ; 25 St. Rep. 658 ; 7 Supp. 36.

Testimony of an attorney representing a purchaser of real estate in preparing the deed, as to declarations of his client to the effect that he held the property for the benefit of another, is privileged. *McIntyre v. Costello*, 6 Supp. 397 ; 24 St. Rep. 765.

But the attorney may testify that he drew a deed of his client's property conveying the same to certain persons, as knowledge thus obtained is not a privileged communication. *Sommer v. Oppenheim*, 14 Misc. 605 ; 40 Supp. 396 ; 78 St. Rep. 396. Also see *Hebbard v. Haughian*, 70 N. Y. 54.

A communication is privileged which was made to an attorney for the purpose of having him draw up an affidavit to procure a reduction of an assessment of his real estate. *William v. Fitch*, 18 N. Y. 546. Also, the information given by the client upon which the attorney drew the complaint, although not sworn to nor read over by the client. *Armstrong v. People*, 70 N. Y. 38. Also,

the information necessary to enable his attorney to decide a complaint in his client's action. *Sibley v. Waffle*, 16 N. Y. 180. Thus on a trial for seduction, the complainant's counsel in a former action for breach of promise cannot be asked if he obtained the facts of that complaint from her. *Armstrong v. People*, 70 N. Y. 38.

But held that a pleading is not regarded as privileged, when it was not found in, nor produced from, the papers of the attorney who drew it, who had since died, but was found among the papers of the plaintiff's wife, whose title was confirmed by it, and who has a right to use it to repel any assault upon her title. *Wilson v. Clancy*, 6 App. Div. 449.

But an attorney is incompetent to testify to any information gained by him through professional relations with a party, or that he has such information as to create a belief in his mind as to the question at issue. *Eastman v. Kelly*, 16 St. Rep. 894 ; 1 Supp. 866.

But it has been held that such facts regarding his client or the cause, which the attorney learned from others, are not privileged. *Johnson v. Davergne*, 19 Johns. 134 ; *Hunter v. Watson*, 12 Cal. 363 ; *Rhodes v. Selin*, 4 Wash. C. C. 715 ; *Patton v. Moore*, 29 N. H. 163 ; *Rogers v. Dare*, Wright (Ohio), 136 ; *Wilson v. State*, 24 Ark. 346.

Where communications are made to an attorney by either of two or more parties in the presence of the others, while he is employed as their common attorney to give advice as to matters in which they are mutually interested, the rule prohibits him from testifying to such communications in an action between his clients and third parties. *Root v. Wright*, 84 N. Y. 72 ; rev'g 21 Hun, 244.

But where two or more persons together consult an attorney for their mutual benefit, or where he has acted for both parties, the attorney may, in a subsequent action between the parties, testify in regard to confidential communications so made to him by them. *Sanford v. Frost*, 9 App. Div. 55; *Britton v. Lorenze*, 45 N. Y. 527; *Rosenberg v. Rosenberg*, 40 Hun, 91; *Sherman v. Scott*, 27 Hun, 331; *Cahoon v. Com.*, 21 Gratt. (Va.) 822; *Hanlon v. Doherty* (Ind.), 9 N. E. Rep. 782; *Robson v. Kemp*, 5 Esp. (Eng.) 52; *Contra, Hull v. Lyon*, 27 Mo. 670.

All letters from an attorney to his client or from the client to the attorney, which are confidential in their nature, are also privileged. *Matter of Whitlock*, 15 Civ. Pro. Rep. 204; 2 Supp. 683. Thus, where a client, in divorce proceedings, had made an affidavit that he did not know the whereabouts of his wife, it was held error, upon his trial for perjury, for the wife's attorney to produce letters written by the husband to her, tending to show that he did know her whereabouts, which were introduced without the wife's consent, and against her express wish. *Selden v. State*, 74 Wis. 271.

Also, a paper executed between an attorney and client, and having reference to the action, is privileged. *Genet v. Ketcham*, 62 N. Y. 626. Nor can a former counsel for a party to a litigation be required to produce papers received from such client, without the latter's consent. *Estate of Hoyt*, 7 Civ. Pro. Rep. 374. Papers entrusted to an attorney by his client are held not necessarily to be deemed privileged, and if he swears he is ignorant of their contents are not so deemed. *Mitchell's Case*, 12 Abb. 249. Also, if a document in the attorney's possession is called for, he must produce it for the inspection of

the court. *Id.* The production of documents in the hands of counsel can be resisted only where a controversy exists, or is anticipated in relation to the subject on which communications were made to counsel or the documents entrusted to him. *People v. Sheriff*, 29 Barb. 622 ; *Peck v. Williams*, 13 Abb. 68 ; *Mitchell's Case*, 12 Abb. 249. Writings, documents and the like, of third parties, even though delivered to the attorney by his client, are not privileged. *Matter of Whitlock*, 15 Civ. Pro. Rep. 204 ; 2 Supp. 483 ; 21 St. Rep. 719.

§ 62. **What communications are not privileged.** Certain communications and certain information, gained from the client, are not considered privileged. Thus it was held that the attorney who drew the plaintiff's deed of the land for which the money in question was received could testify to that fact, to declaration by grantee or grantor at the time the deed was drawn, made in the presence of the plaintiff, and relating to the agreement for the investment of the money. *Sheldon v. Sheldon*, 11 Supp. 477 ; 33 St. Rep. 754 ; *Greer v. Greer*, 56 Hun, 251 ; 34 St. Rep. 448 ; *Hebbard v. Haughian*, 70 N. Y. 54 ; *Shufelt v. Watrous*, 16 Week. Dig. 198. Also, that a deed was acknowledged at the grantor's house. *Mut. Life Ins. Co. v. Carey*, 54 Hun, 493. Also, to the instructions given to him at the time, where the issue was whether an assumption clause had been inserted without the knowledge or consent of the grantee. *Van Alstyne v. Smith*, 82 Hun, 382 ; 63 St. Rep. 595 ; 31 Supp. 277.

Also held, that the attorney must testify as to the delivery to him of an instrument by his client, for delivery to another. *Rousseau v. Bleau*, 131 N. Y. 177. Also, the attorney who drew the will may testify to the declarations of the testator in the presence of witnesses at



the time of its execution, in relation to the will, and his satisfaction with its contents. *Will of Smith*, 39 St. Rep. 698 ; 15 Supp. 425.

An attorney may testify that his client directed him to make, and that he wanted him to make, an assignment of a bond and mortgage ; also to directions given by his client for his actions. *Brennan v. Hall*, 20 Civ. Pro. Rep. 434 ; 39 St. Rep. 130 ; 131 N. Y. 160. Also, to declarations of his client made in the presence of the adverse party. *Hebbard v. Haughian*, 70 N. Y. 54 ; *Whiting v. Barney*, 30 N. Y. 330 ; *Prouty v. Eaton*, 41 Barb. 409 ; *Woodruff v. Husson*, 32 Barb. 557 ; *Brand v. Brand*, 39 How. Pr. 193 ; *Colt v. McConnell*, 116 Ind. 249. Nor are communications made in the presence of all parties privileged. *Britton v. Lorenz*, 45 N. Y. 51 ; aff'g 3 Daly 23 ; *Whitting v. Barney*, 30 N. Y. 330 ; *Smith v. Crego*. 54 Hun, 22 ; 7 Supp. 86. Nor conversations had in his presence between his client and third party or as to the declarations of such third party. *Brennan v. Hall*, 131 N. Y. 160 ; 39 St. Rep. 130.

Also, statements made by two mutually interested parties in the presence of each other, to an attorney, may be testified to by the attorney after their death, in an action between their personal representatives. *Hurlburt v. Hurlburt*, 21 Civ. Pro. Rep. 277 ; 128 N. Y. 420 ; aff'g 18 St. Rep. 407 ; 2 Supp. 317 ; *Sherman v. Scott*, 27 Hun, 331 ; 2 Civ. Pro. 366.

An attorney may also testify to facts which the parties to an agreement openly stated to each other and requested him to embody in an agreement. *Matter of Hicks*, 14 St. Rep. 320. Also, to a conversation had with his client touching the disposition of the proceeds of a collected claim. *Mulford v. Muller*, 1 Keyes, 31 ; 3 Abb.

Ct. App. Dec. 330. Also, to the fact of his employment. *Hampton v. Boylan*, 46 Hun, 151 ; 10 St. Rep. 788.

On a trial for an assault, testimony of an attorney, that at a certain time after the assault he was employed by a third person to do some business with the defendant, and that after the business was transacted the defendant used threatening language against the assaulted person, held not objectionable as disclosing a privileged communication. *State v. Merchant* (N. H.), 18 Ct. Rep. 654.

Where the defendant was arrested for attempting to obtain money on false pretenses from a railroad company, and it was alleged that he sought to obtain damages for two trunks which he falsely claimed had been lost by the company, the court held that the defendant's attorney was properly required to testify as to his employment by the defendant to demand compensation from the company. *White v. State*, 86 Ala. 69. Also, that an attorney must testify that, in collecting a claim which his client had assigned, he acted in behalf of such client, and that he was forbidden by the latter from paying the proceeds over to the assignee. *Mulford v. Muller*, 3 Abb. 330.

A communication by one interested in an estate as a legatee to the attorney of the executor, with reference to a matter connected with the estate, is not privileged. *Althouse v. Wells*, 40 Hun, 336. Nor are the circumstances of a mutual contract between himself and his client—such as a mortgage—when its validity is attacked within the rule. *Foster v. Wilkinson*, 37 Hun, 242. Nor a communication by a plaintiff to his attorney for the purpose of its publication to the defendant. *Bartlett v. Bunn*, 10 Supp. 210. Nor where such communication was imparted to the attorney with a request to

disclose it to another. *Collins v. Robinson*, 72 Hun, 495. And the attorney may testify to the purpose for which such communication was made to him. *Id.*

Communications made to a friend, or to an attorney in the presence of a friend, are not privileged. *People v. Buchanan*, 145 N. Y. 1 ; 64 St. Rep. 427. Nor are communications made to an attorney who had acted as a mutual friend of the parties in an attempted settlement of the claim by defendant. *Honlenbeck v. McGibbon*, 60 Hun, 26 ; 14 Supp. 393 ; 20 Civ. Pro. Rep. 406 ; 38 St. Rep. 652.

An attorney who was also a surrogate's clerk was permitted to testify to communications made to him by the plaintiff as to the claim in suit, when the plaintiff endeavored to procure his services in arranging a settlement, and he declined to act. *Avery v. Mattice*, 29 St. Rep. 706 ; 9 Supp. 166. Also held, that terms of compromise offered by an attorney to the creditors of his client are not confidential. *McTavish v. Denning*, Anth. 155.

A direction by a client to his attorney, to employ a certain person in connection with the suit in question, is not privileged. *Martin v. Platt*, 51 Hun, 429 ; 21 St. Rep. 330 ; 4 Supp. 359.

Also held, that this section does not shield a party from a disclosure by him of the facts relating to his delivery to his attorney of letters which are the legitimate subject of inquiry. *Chellis v. Chapman*, 26 St. Rep. 953 ; 7 Supp. 78. Also held, that an attorney for the defendant can be compelled to produce letters written to the defendant by the plaintiff. *Harrisburg Car Manuf'g Co. v. Sloan* (Ind.), 21 N. E. Rep. 1088.

Also, that an attorney may be compelled to prove the existence of a paper, and that it is in his possession, so that the other party may give secondary evidence of its

contents. *Brandt v. Klein*, 17 Johns. 335; *Jackson v. McVey*, 18 Id. 330.

Also held, that an attorney may testify to the handwriting of a former client. *Holthausen v. Pondir*, 55 Supr. Ct. 73; 18 St. Rep. 369; aff'd 29 Id. 996.

An accomplice who has turned state's evidence has been held not to be privileged in regard to answering questions which disclose his confidential communications to his attorney. *People v. Gallagher*, 75 Mich. 512; *Jones v. State* (Miss.), 3 So. Rep. 379.

§ 63. **On probate of a will.** It has been held that the same rule applies under probate proceedings as to the privilege of communications by word or act of a client to his attorney, employed by him to draw his will, upon that subject, or made to others in the attorney's presence, and they cannot be disclosed by the attorney on the probate of the will, unless he was a subscribing witness thereto. *Matter of O'Neil*, 26 St. Rep. 242; 7 Supp. 197.

Thus it was held that the attorney could not state a conversation had between him and decedent relating to the drawing of a codicil, not executed prior to the instrument propounded. *Pearsall v. Elmer*, 5 Redf. 181.

Also, a conversation in relation to preparing a new will. *Estate of Wood*, 3 Law Bull. 71. Also, as to communications made to him by the testator, not in the presence of the subscribing witness or any third party, relating to the disposition of his property. *Matter of McCarthy*, 38 St. Rep. 124.

But held that the testimony of the attorney who drew the will is admissible in connection with other evidence, to show the purpose of the testator in making a particular bequest therein. *Sanford v. Sanford*, 61 Barb. 293; 5 Lans. 486. Also, one acting as legal adviser of a testator,

who becomes thereafter a subscribing witness, may testify to matters relating to its preparation and due execution. *Matter of Elston*, 6 Dem. 154 ; Code Civ. Pro. § 836.

This rule does not apply where the attorney who drew the will is employed to contest it, and he cannot claim privilege against testifying. *Sheridan v. Houghton*, 16 Hun, 628 ; 6 Abb. N. C. 234 ; aff'd 84 N. Y. 643.

It was held error, in probate proceedings, to refuse to permit the proponents to show by the draughtsman of the will, who was also an attorney and trustee under it, the instructions received by him, and that they were carried out. *Matter of Chase*, 41 Hun, 203 ; 4 St. Rep. 195 ; *Matter of Austin*, 42 Hun, 516. Also held, that where there is a contest of a will, the written instructions of the testator to the attorney who drew the will are not privileged. *In re Chapman*, 27 Hun, 573.

An attorney is also a competent witness to prove all acts of a testator connected with the making and execution of the will, which tend to uphold it. *Matter of McCarthy*, 55 Hun, 7 ; 28 St. Rep. 342.

§ 64. **Waiver.** The privileges granted by this section may of course be waived by the client, and when this is the case the attorney has no option in the matter. Code Civ. Procedure, § 836 ; *Westover v. Aetna Life Ins. Co.*, 99 N. Y. 56 ; *Bacon v. Frisbie*, 80 N. Y. 394 ; *Bank v. Mesereau*, 3 Barb. Ch. 596.

This waiver need not be in writing, or in any particular form, but it must clearly show the intention to exempt the attorney in such case. *Matter of Coleman*, 111 N. Y. 220 ; 19 St. Rep. 501.

This privilege may also be waived by the personal representatives of the client. *Staunton v. Parker*, 19

Hun, 55 ; *Whelpley v. Loder*, 1 Dem. 368 ; *Allen v. Pub. Admr.*, 1 Bradf. 221 ; *Pearsall v. Elmer*, 5 Redf. 181.

It has also been held that this privilege remains to the client after his interest has been assigned. *Benjamin v. Coventry*, 19 Wend. 353.

This waiver may also be made indirectly.

Thus, where the defendant himself examined his counsel as a witness, he waives his privilege, and cannot object to the testimony as incompetent. *Benjamin v. Coventry*, 19 Wend. 353 ; *Masterton v. Boyce*, 53 Hun, 630 ; 6 Supp. 65 ; Ohio Code Civ. Pro. § 315.

Also held, that the client has the right to call his counsel as a witness to testify to conversations between them. *Smith v. Crego*, 61 Hun, 22.

Where the client himself subpoenas his attorney to produce papers, he cannot object if the papers are produced pursuant to the subpoena, but gives his adversary the right to put those pertinent to the issue in evidence. *Estate of Hoyt*, 7 Civ. Pro. Rep. 374.

It is the rule in England, and also seems to be held in some of our states, that a waiver of privilege is made when the defendant himself goes upon the stand ; and that upon cross-examination he may be asked questions touching the subject-matter of those confidential or secret matters which have been confided by him to his counsel. *Woburn v. Henshaw*, 101 Mass. 193 ; *King v. Barrett*, 11 Ohio St. 261 ; *Com. v. Nichols*, 114 Mass. 285. But this rule does not appear to be in general favor in our courts, and it will need more careful examination of this subject, and a greater weight of authorities than are at present obtainable, before a rule of such doubtful expediency will be held to be binding upon American courts. Indeed it would appear that the con-

trary view would be more generally held, since the courts have emphatically decided generally that the protection of the client and legal adviser in this respect are co-extensive, and that professional communications are absolutely privileged. *Bigler v. Reher*, 43 Ind. 112; *Barker v. Kuhn*, 38 Iowa, 395; *State v. White*, 19 Kans. 445; *Bobo v. Bryson*, 21 Ark., 387; *Hemmingway v. Smith*, 28 Vt. 401; *Carnes v. Platt*, 15 Abb. (N. Y.) Pr. N. S. 337; *Alderman v. People*, 4 Mich. 414; *Dittenhofer v. State*, 34 Ohio St. 91.

Where a testator asks his attorney to act as a witness to his will he waives the privileges of secrecy afforded by the statute. *Matter of Coleman*, 141 N. Y. 220; 19 St. Rep. 501; *In re Gagan's Will*, 20 Supp. 426; 21 Id. 350.

The statute upon this point is: "But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate, or hereafter to be executed or offered for probate, from becoming a witness as to its preparation and execution, in case such attorney is one of the subscribing witnesses thereto." Code Civ. Pro. § 836.

It has also been held that where there are several defendants in an action, who are jointly interested in the legal proceedings, and they have made confidential communications to, or consulted with, their common counsel, relating to the matters at issue, such matters concerning their common cause are privileged as to all the defendants, and it is not sufficient to render their attorney a competent witness as to the same, that the majority of the defendants have united in waiving their privilege; all must waive it in order to render the attorney competent to divulge such communications. *Bank v.*

*Mesereau*, 3 Barb. Ch. 596 ; *Doe v. Watkins*, 3 Bing. (N. C.) 421 ; *Reynell v. Sprye*, 10 Beav. 51.

It also seems that even where the party making such confidential communications is not a party to the action, an objection by the party against whom it is offered will lie on the ground of public policy. *Bacon v. Frisbie*, 80 N. Y. 394.

§ 65. **Communications to physicians.** "A person duly authorized to practise physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." Code Civ. Pro. § 834.

Where a party seeks to exclude the testimony of a physician, the burden of proof rests upon him to bring the case within the provisions of the statute. *People v. Schuyler*, 106 N. Y. 298 ; aff'g 43 Hun, 88 ; *Heath v. Broadway & Seventh Ave. R. R. Co.*, 57 Supr. 496 ; *Henry v. N. Y. & L. E., etc., R. R. Co.*, 19 Civ. Pro. 188 ; 57 Hun, 76.

The burden of proof is upon the party who seeks to exclude the testimony, not only of showing that the information was acquired by the witness attending the patient in a professional capacity, but it must be shown in addition that it was such as was necessary to enable him to act in that capacity. *Stowell v. Am. Relief Ass'n*, 1 Silv. Sup. Ct. 246.

The privilege conferred by this section is for the benefit of the patient, and not the physician. *Johnson v. Johnson*, 14 Wend. 636.

Before this statute can be invoked, however, it must appear that the relation of physician and patient really existed between the witness and the objecting party, and



the information was necessary to enable him to act. *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564; rev'g 13 Hun, 543; *Herrington v. Winn*, 60 Hun, 235; *Henry v. N. Y. L., etc., R. R. Co.*, 19 Civ. Pro. Rep. 188; 57 Hun, 76; *Heath v. Broadway, etc., R. R. Co.*, 57 Supr. 496.

This section excludes any knowledge derived by the physician from his patient, either by the patient's statements, or the statements of others present, or his own observation of the patient's symptoms. *Edington v. Mut. Life Ins. Co.*, 67 N. Y. 185; rev'g 5 Hun, 1; *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; *Grattan v. Met. Ins. Co.*, 80 N. Y. 281; *Grattan v. Nat. Life Ins. Co.*, 15 Hun, 74; *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564.

This statute applies only to information acquired by the physician in attending the patient in a professional capacity for the purpose of enabling him to act in that capacity, and does not apply to information obtained by him in any other way. *Renihan v. Dennin*, 103 N. Y. 573; aff'g 38 Hun, 570; *Fisher v. Fisher*, 42 St. Rep. 100; 129 N. Y. 654; 3 Silv. Ct. App. 640; 22 Civ. Pro. Rep. 48; *Hoyt v. Hoyt*, 9 St. Rep. 731; *In re Lowensteine Will*, 2 Misc. 323; 21 Supp. 931; *Henry v. N. Y., etc., R. R. Co.*, 57 Hun, 76; 19 Civ. Pro. Rep. 188. Nor are physicians disqualified from testifying as to those matters which are apparent to all persons skilled in medicine, whether called professionally or not. *In re Lowensteine Will, supra*. On the other hand, it has been held that it is not necessary to establish that the knowledge which a physician has acquired in respect to his patient, while attending her professionally, was necessary to enable him to prescribe for her; it is only necessary in order to

exclude his testimony to show that he acquired the information during the course of his professional visits. *Matter of Darragh*, 53 Hun, 591; 22 St. Rep. 553; rev'g 15 St. Rep. 452. But this provision does not apply to a physician who makes a casual prescription for a friend when meeting him upon the street. *Edington v. Mut. Life Ins. Co.*, 5 Hun, 1; rev'd on other grounds, 67 N. Y. 185. But see *People v. Stout*, 3 Park, 670.

This statute excludes information derived from the sense of sight, as well as the sense of hearing, and it is not requisite to its exclusion that formal proof should be given, in the first instance, that the information was necessary to enable the physician to prescribe. *Grattan v. Met. Ins. Co.*, 80 N. Y. 281. Nor need the examination or consultation be private, in order that the statute may apply. *Id.*

A physician himself is a competent witness to show whether his knowledge of a fact regarding his patient was or was not necessary to the due performance of his professional duties. *Estate of Darragh*, 15 St. Rep. 452; rev'd on another point, 52 Hun, 591; 22 St. Rep. 553.

If the communications made by the patient are those upon which the physician relies in prescribing for the former, they are privileged. *Edington v. Aetna L. Ins. Co.*, 17 Week. Dig. 566. And whether the witness was actuated by curiosity or a higher motive makes no difference. *Grossman v. Sup. Lodge*, 25 St. Rep. 843; 6 Supp. 821.

It has been held that it is sufficient to bring the case within the section that the physician attended as such and acquired his information in that capacity. *Brigham v. Gott*, 20 St. 420. And a physician who attends with the attending physician for the purpose of consultation

with the latter in regard to the patient's condition is within the section. *Renihan v. Dennin*, 103 N. Y. 573 ; aff'g 38 Hun, 270.

It makes no difference upon the question whether the evidence of the physician is incompetent under this section :

First : That the physician had not known the patient until the first interview. *Grattan v. Met. Ins. Co.*, 24 Hun, 43.

Second : That he was not consulted for a prescription and did not prescribe, but only for advice as to the patient's ability to continue in business. *Id.*

Third : That the patient's employer requested the physician to examine him for that purpose, and paid for the physician's services. *Id.* But held, that a physician not employed by the plaintiff, but sent by the defendant to procure information as to the extent of the plaintiff's injury, and to obtain admissions as to the accident, is not within the prohibition. *Heath v. Broadway, etc., R. R. Co.*, 29 St. Rep. 267 ; 8 Supp. 863.

Where a physician is selected by the prosecution and sent to a prisoner after a crime has been committed, and the prisoner accepts his services in a professional character, disclosures made by him are privileged ; and this rule applies to both civil and criminal proceedings. *People v. Murphy*, 101 N. Y. 126 ; rev'g 22 Week. Dig. 145.

But a physician employed by the prosecution for the special examination of a person accused of a crime, for the purposes of prosecution, is not attending a patient in a professional capacity, and the physician is not rendered incompetent on that ground to disclose information acquired by him in such capacity. *People v. Hoch*, 150 N. Y. 291. Thus held, where a physician was sent by

the prosecution to examine a prisoner as to his sanity. *People v. Sliney*, 137 N. Y. 570.

As to jail physicians, the tendency of the decisions seems to be, that they do not come within the prohibitions of this section. *People v. Schuyler*, 106 N. Y. 298; aff'g 43 Hun, 88.

This statute has been held applicable to proceedings upon an inquisition in lunacy, and the evidence of an attending physician held incompetent thereon. *Matter of Baird*, 11 St. Rep. 263. But see *In re Benson*, 16 Supp. 111. Also held to apply to the affidavit of a physician made for the purpose of supporting application for appointment of committee of a lunatic or habitual drunkard. *Matter of Hoyt*, 20 Abb. N. C. 162.

This rule, however, seems to apply only to regular licensed medical practitioners, and does not extend to medical students, irregular practitioners or attendants in a physician's office. *Wiel v. Cowles*, 45 Hun, 307; 12 St. Rep. 427; *Kendal v. Grey*, 2 Hilt. 300. The death of the patient does not remove the obligation of secrecy. *Grattan v. Met. Life Ins. Co.*, 80 N. Y. 281.

Also held, that if the result of the whole examination cannot be given because forbidden by statute, no part thereof is proper. *Id.*

A physician may, however, testify to the facts, that a person was his patient; that he attended such person as his patient; and the dates and number of times, hourly or daily, that he did so attend such patient. *Patten v. N. L. & A. Ins. Assoc.*, 133 N. Y. 450; 22 Civ. Pro. Rep. 247; 45 St. Rep. 661.

§ 66. **What are privileged.** Information obtained by a physician with respect to the health of the insured, or as to other matters, while such insured was his patient,

is privileged. *Diliber v. Home L. Ins. Co.*, 10 Week. Dig. 180 ; 64 N. Y. 256 ; *Patten v. United L. & Acc. Ass'n*, 16 Supp. 376.

Thus, in an action on a life insurance policy, the court refused to permit the certificate of the physician, furnished by the guardian to the association, and stating the cause of death to be delirium tremens, to be read in evidence. *Buffalo L. T. & S. Dep. Co. v. Knights' T. & M., etc., Ass'n*, 126 N. Y. 451 ; 38 St. Rep. 246. Also held, that a physician cannot testify to the physical condition of the insured at a time subsequent to the issuing of the policy ; nor is the privilege waived by offering the certificate of the death of the insured. *Redmond v. Ind. Ben. Assoc.*, 28 Supp. 1075.

In an action upon a life insurance policy which contained a clause avoiding it in case insured committed suicide, it appeared that the insured hanged himself. Plaintiff claimed that the deceased was insane at the time. A physician who attended the deceased shortly before his death was asked by the plaintiff, "How did you find him?" It was held that such evidence was incompetent, on the ground that a waiver of such privilege cannot be made by the personal representatives of deceased. *Westover v. Aetna L. Ins. Co.*, 99 N. Y. 56. But this rule has now been changed by the present section eight hundred and thirty-six of the Code.

It has also been held incompetent for a physician to testify whether a party had a venereal disease while under his care. *Sloan v. N. Y. C. R. R. Co.*, 45 N. Y. 125. Also, he cannot testify, in an action for divorce, to conversations with his patient tending to show him guilty of the charge of adultery. *Hunn v. Hunn*, 1 T. & C. 499. But held in a civil action for seduction that a physi-

cian called by the plaintiff was competent to certify that the defendant had consulted him as to the best means of procuring an abortion. *Hewitt v. Prime*, 21 Wend, 79.

In an action for personal injuries, a physician upon whom the plaintiff called the day after the accident was asked by the defendant's counsel if he conversed with her about the injuries, and if he made an examination of her. It was held that the question was incompetent within the statute. *Feeny v. L. I. R. R. Co.*, 116 N. Y. 375 ; 26 State Rep. 729 ; aff'g 5 Id. 63. In an action for personal injuries, plaintiff's physician in attendance on the day of the amputation of plaintiff's leg was asked by the defendant's attorney, "What was the condition of plaintiff's leg at that time?" Held incompetent. *Jones v. B. B. & W. E. R. R. Co.*, 21 St. Rep. 169 ; 3 Supp. 253. Also, in a similar action, where a physician testified he had visited the plaintiff professionally, and found no indications of injuries, he was held incompetent. *Williams v. Johnson* (Ind.), 13 N. S. Rep. 872. Neither can physicians who attended a party prior to the infliction of the injuries complained of be examined as to the prior physical condition of the party, when the latter has not put the same in issue. *Butler v. M. R. R. Co.*, 3 Misc. 453 ; 30 Abb. N. C. 78 ; 22 Sup. 163 ; 24 Id. 142.

Upon a trial of an indictment for assisting in procuring a miscarriage, it was held that statements made by the defendant to the physician when called to attend the woman when dangerously ill, in reply to his inquiries and to enable him to prescribe for her, were privileged. *People v. Brower*, 53 Hun, 217 ; 24 State Rep. 938.

It has also been held that a physician cannot be compelled to deliver to a receiver of his property his original

book of account, which contains privileged information concerning his patients. *Kelly v. Levy*, 29 St. Rep. 659 ; 8 Supp. 849. Also held, that such a book of account is not subject to inspection and discovery at the instance of the defendant, in an action brought by him. *Mott v. Consumers' Ice Co.*, 2 Abb. N. C. 143.

§ 67. **What are not privileged.** A physician who attended the deceased is competent on reference of a claim against his estate for services brought by a professional nurse, to testify to such services, and also to statements made to him by the deceased in reference thereto. *Re McQueen's Estate*, 13 Supp. 705 ; 37 St. Rep. 602.

A physician who attended an injured person at a railroad crossing may testify as to his declarations concerning means taken to warn him of an approaching train, *Brown v. R. W. & C. R. R. Co.*, 45 Hun, 429 ; 12 St. Rep. 446. Also, as to the probable permanency of the physical ailments, where he does not claim that such ailments were caused by the accident. *Brown v. Third Ave. R. R. Co.*, 18 Misc. 584 ; 42 Supp. 700 ; 76 St. Rep. 700.

A physician who attended a testator during the last year of his life was held competent to answer questions which went only to his observations made of outward visible facts that were seen by him on those occasions when he was not attending testator as a physician. *Burley v. Barnhard*, 9 St. Rep. 587.

Also held, in an action against a life insurance company upon a policy, when a physician testified, in behalf of plaintiff, that he had attended the policy-holder for several months, and then ceased doing so, although his acquaintance with him continued until the latter's death, that he might testify whether the testator was cured

when he ceased attendance upon him, and also as to his general health, judging only from his appearance since the relation between them had ceased. *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564; rev'g 13 Hun, 543. Also, in an action of the same nature, held that the defendant might prove by physicians the naked fact that he attended the deceased professionally. *Numrich v. Supreme Lodge*, 3 Supp. 552.

But held, in a similar case, where the defense was false representations on the part of the insured in making his application, that he was not suffering from a certain disease, that it was incompetent to allow physicians to testify that they had treated the insured prior to the date of the policy, and that they were specialists and competent to treat such diseases. *McCormick v. United L. & A. Ins. Ass'n*, 79 Hun, 340; 60 St. Rep. 589; 29 Supp. 364.

As to whether this section authorizes a physician to testify that a patient was free from a disease, *quaere*. *People v. Schuyler*, 106 N. Y. 298; aff'g 43 Hun, 88.

It has been held that this statute cannot be invoked to shield one charged with the murder of his patient. *People v. Harris*, 136 N. Y. 448.

On the trial of an indictment for murder by poisoning, a physician who was called to attend the deceased while sick from the poison, was allowed to state for the prosecution what he learned from his own examination and the statements of deceased to him. *Pierson v. People*, 79 N. Y. 424; aff'g 18 Hun, 239.

A physician called as a witness was allowed to state what took place between the decedent and another physician, when it appeared he was not the physician of the decedent at the time, nor attended at the time for



the purpose of prescribing. *Stowell v. Am. Relief Ass'n*, 23 St. 706.

§ 68. **Probate Proceedings.** This statute is applicable to testamentary cases. *Mason v. Williams*, 53 Hun, 398; *Loder v. Murphy*, 111 N. Y. 239. When a probate of a will is contested upon the ground of unsoundness of testator's mind, a physician who attended the deceased professionally is not a competent witness for the contestants as to any knowledge gained while attending deceased. *Matter of Coleman*, 111 N. Y. 220; 19 St. Rep. 501; *In re Connor*, 5 Silv. Sup. Ct. 261; 27 St. Rep. 905; *Matter of Hannah*, 11 St. Rep. 807.

But it has also been held that a physician is competent to testify to such facts in favor of the contestants, when they waived the privilege as the personal representatives of deceased. *Staunton v. Parker*, 19 Hun, 55.

In proceedings to probate a will, the opinion of a physician based on facts and observations derived by him while attending the testator, as to whether the testator could correctly and intelligently comprehend the nature and condition and value of his property, is admissible. *Van Orman v. Van Orman*, 34 St. Rep. 824; 11 Supp. 931.

Also held no error for physicians to testify in favor of proponents as to declarations of testator as to the contestant's mental incapacity. *Hoyt v. Hoyt*, 112 N. Y. 493. Also, the family physician can testify, on probate of a will, as to family events in no way connected with physical complaints, and which were not obtained for the purpose of treating a patient. *Matter of Boury*, 8 St. Rep. 809. Also, as to declarations of testator as to making his will, and his advice upon the subject. *Matter of O'Neil*, 26 St. Rep. 242. Also, to other statements

made to him by the testator, which were not necessary to enable him to act professionally. *Matter of Halsey*, 29 St. Rep. 533 ; 9 Supp. 441.

Where a physician was called for the purpose of showing that decedent was unconscious on a certain day, he should be permitted to state as to whether the information he obtained was necessary for him to prescribe, or whether he obtained any information that day that was so necessary, and whether the decedent's condition was such that any person of ordinary intelligence could understand it as well as a physician. *Herrington v. Winn*, 20 Civ. Pro. Rep. 326 ; 38 St. Rep. 83.

Also held competent, in an action contesting the validity of a will, for the deceased's physician to testify that, in his interview with testatrix, her gestures and conversation, language, everything that he could observe, impressed him as coming from a person of ordinary sound mind. *Steele v. Ward*, 30 Hun, 555.

§ 69. **Objections to testimony.** Under the statute, the former rule, limiting the right to object to a physician's testimony to the patient himself, is now done away with, and the personal representatives of a deceased patient may now claim the like privilege. Code Civ. Pro. §§ 834, 836.

The right of objecting to disclosures by a physician of a privileged communication may also be exercised by an assignee, and his right is not affected by the death of the patient. *Edington v. Mut. L. Ins. Co.*, 67 N. Y. 185 ; 77 N. Y. 564.

But it has been held that a witness cannot make the objection. *Johnson v. Johnson*, 14 Wend. 637. Nor a defendant in a criminal trial invoke the privilege of another person in respect to privileged communications

made by another person to his physician. *People v. Murphy*, 101 N. Y. 126.

The objection to such disclosures must be made at the time the evidence is given. *Hoyt v. Hoyt*, 112 N. Y. 493 ; 21 St. Rep. 593 ; aff'g 9 Id. 731 ; 45 Hun, 590.

An objection as to the proof of the medical attendant being duly authorized to practise must have been taken at the trial to be available on appeal. *Record v. Village of Saratoga*, 46 Hun, 448 ; 12 St. Rep. 395.

§ 70. **Waiver.** "But a physician or surgeon may, upon a trial or examination, disclose any information as to the mental or physical condition of a patient who is deceased, which he acquired in attending such patients professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, where the provisions of section eight hundred and thirty-four have been expressly waived on such trial or examination by the personal representatives of the deceased patient, or if the validity of the last will and testament of such deceased patient is in question, by the executor or executors named in said will, or the surviving husband, widow or any heir at law or any of the next of kin of such deceased, or any other party in interest." Code Civ. Pro. § 836.

Under the Code prior to the present amendments the privilege of waiver in this respect, where the validity of a will was at issue, was confined to the executors thereof, but it is now extended so as to include the persons mentioned in the statute. *Matter of Murphy*, 85 Hun, 575 ; 33 Supp. 198 ; 66 St. Rep. 826. The waiver need not be in writing or in any particular form, but it must clearly show the intention to exempt the physician in such case. *Matter of Coleman*, 111 N. Y. 220 ; 19 St. Rep. 501.

Where a physician is called as a witness by his patient the latter's attorney may waive the privilege in his client's behalf. *Alberti v. N. Y., L. E., etc., R. R. Co.*, 118 N. Y. 77 ; 27 St. Rep. 865 ; aff'g 43 Hun, 421.

Where the statutory provisions have been waived by the patient, and the information has been made public, the right to object is also waived. *McKinney v. Grand St., etc., R. R. Co.*, 104 N. Y. 352 ; 4 St. Rep. 349 ; rev'g 35 Hun, 668.

It has been held that this section does not apply in a case where the privilege was expressly waived by the deceased in the contract upon which the action is brought. *Foley v. Royal Arcanum*, 78 Hun, 222 ; 28 Supp. 952 ; 60 St. Rep. 221 ; aff'd 151 N. Y. 196.

Thus, where an application for a policy of life insurance contained the following stipulation : "The provisions of section 834 of the Code of Civil Procedure of the State of New York, and of similar provisions in the laws of other states, are hereby waived, and it is expressly consented and stipulated that, on any suit on the policy herein applied for, any physician who has attended or may hereafter attend the insured may disclose any information acquired by him in anywise affecting the declarations and warrants herein made." It was held such stipulation was a direct waiver, and the testimony of an attending physician was competent on the trial of an action on the policy. *Dougherty v. Met. L. Ins. Co.*, 87 Hun, 15 ; 33 Supp. 873 ; 67 St. Rep. 489. Also held, that such stipulations were not against public policy. *Id* ; *Foley v. Royal Arcanum*, 151 N. Y. 196.

In the above cases, however, the stipulations were made before the amendment to the statute in 1891, which provides that such waiver shall be made *upon the*

*trial*. But in a more recent case the court states, without reserve, that such a stipulation is valid even with the present amendment. *Holden v. Met. Life Ins. Co.*, 11 App. Div. 426 ; 42 Supp. 310 ; 76 St. Rep. 310. It does not seem to be at all clear, however, that such is the case. The latest decision upon this subject, in *Foley v. Royal Arcanum, supra*, carefully refrains from deciding this point, but bases its finding solely upon the ground that the stipulation was made prior to the amendment of 1891, and that the subsequent amendment requiring the waiver to be made on the trial did not affect it. It would seem, therefore, that until a positive interpretation of the statute on this point is given by the court of last resort, the effect of such a stipulation, made since the amendment of 1891, is a matter of doubt.

It has been held that a decedent, by requesting physicians called to examine her as to sanity to witness her will, expressly waives her privilege of objecting to the disclosure of information thus acquired. *Matter of Freeman*, 46 Hun, 458 ; 12 St. Rep. 175.

But held, in an action to recover for personal injuries, that the plaintiff by waiving her right in respect to one physician, did not authorize the defendant to call the others who had attended her. *Hope v. Troy L. R. R. Co.*, 40 Hun, 438 ; aff'd 16 St. Rep. 948 ; 110 N. Y. 643.

But, on the other hand, it was held that where a party, who had been attended by two physicians at the same examination, calls one of them as a witness to testify as to what took place at that time, he thereby waives his privileges and cannot object to the testimony of the other physician or to the same transaction. *Morris v. N. Y. & O. R. R. Co.*, 148 N. Y. 88 ; rev'g 73 Hun, 560 ; 56 St. Rep. 31 ; 26 Supp. 342.

Where the plaintiff, in an action for personal injuries, testifies without any reservation whatever as to his injuries and their effect upon him, or testifies to a consultation with his physician concerning the injury, he waives his privilege. *Treanor v. Man. R. Co.*, 41 St. Rep. 614 ; 16 Supp. 536 ; 21 Civ. Pro. Rep. 364 ; rev'g 39 St. Rep. 186 ; 14 Supp. 270 ; *Marx v. Man. R. R. Co.*, 56 Hun, 575 ; 10 Supp. 159 ; 31 St. Rep. 914.

Upon this point the court says: "The patient may keep the door of the consultation room closed, but he cannot be permitted to open it so far as to give an imperfect and erroneous view of what took place, and then close the door when the actual facts are about to be disclosed. . . . In construing this legislation we must consider the object that was sought to be obtained, viz., the greatest freedom in consultations with a physician. The reason for the rule no longer exists where the party himself pretends to give the circumstances of the privileged interview." *Marx v. R. R. Co.*, *supra*.

But held that it is not a waiver by the plaintiff of his right to close the lips of his physician, in an action to recover for injuries for the loss of his leg, by offering testimony to the fact that it was broken. *Jones v. B., B., etc., R. R. Co.*, 21 St. Rep. 169 ; 3 Supp. 253.

It seems to be a question whether a patient who calls witnesses as to his mental condition does not waive his privilege. *People v. Schuyler*, 106 N. Y. 298 ; aff'g 43 Hun, 88.

But the interposition of a general denial in an action for medical services is not a waiver of the provisions of the statute. *Van Allen v. Gordon*, 83 Hun, 379 ; 31 Supp. 907 ; 64 St. Rep. 781.

Where this privilege is waived, the physician has no

option in the matter, but must answer the questions. *Valensin v. Valensin* (Cal.), 14 Pac. Rep. 397; *Brown v. Met. L. Ins. Co.* (Mich.), 32 N. W. Rep. 610. Thus held, that he may be compelled to state the result of a *post mortem* examination made by him. *Summers v. State*, 5 Tex. App. 365.

§ 71. **Communications to clergymen.** Such communications or confessions, as are made to one's clergyman, priest or spiritual adviser in the exercise of such clerical character, are also privileged. This privilege did not exist under the common law, and confessions made to priests or clergymen were competent in evidence. Thus, when the prisoner, being a Roman Catholic, made a confession before a Protestant clergyman, that confession was permitted to be given in evidence upon his trial, and he was convicted and executed. *Rex v. Spark* (Eng.), N. P. C. 78. It was also held, upon a trial for a capital offense, that a clergyman is bound to disclose what has been revealed to him as matter of religious confession; and in that case the prisoner was also convicted and executed. *Rex v. Gilham* (Eng.), Ry. & M. C. C. R. 198.

The common law having originally been accepted in this country, the doctrine in this respect was also incorporated in our laws. But the manifest injustice of such a rule has for some time been recognized by the jurists of the United States, and the old dogma of the common law in this respect has been largely done away with. Statutory enactments have placed confessions of this nature in the position that they ought to occupy on the ground of public policy, and placed the seal of prohibition upon all such admissions or confessions. In this state it is provided that: "A clergyman, or other minister of any religion, shall not be allowed to disclose a

confession made to him, in his professional character, in the course of discipline enjoined by the rules of practice of the religious body to which he belongs." Code Civ. Pro. § 833.

It is on the principle here embodied that suits cannot be maintained which would require a disclosure of the confidences of the confessional. *Totten v. U. S.*, 2 Otto (U. S.), 105.

Thus, where it appeared that a chaplain in a work-house had frequent conversations in his pastoral capacity with the inmates, it was held that he should not be called as a witness to confessions so received by him. *Rex v. Griffin* (Eng.), 6 Cox, C. C. 219.

*Limitation of this privilege.* Admissions or confessions are not *per se* privileged because made to a clergyman, but they must have been made to him in his professional character in the course of discipline enjoined by his Church. Thus, admissions made to a clergyman may be received in evidence in a criminal case, when they were not made to him in his spiritual character. *People v. Gates*, 13 Wend. 311. Also, communications received by a priest may be properly testified to when not so made. *Gillooley v. State*, 58 Ind. 182.

*Waiver.* This prohibition of disclosures of confidential communications by a clergyman is intended only for the benefit of the penitent, and cannot be given by clergymen as evidence, unless the privilege is waived, upon the trial or examination, by the person so confessing. Code Civ. Pro. § 836.



## CHAPTER VI.

### HUSBAND AND WIFE.

Sec. 72. Preliminary.

73. What are confidential communications.

74. What are not confidential communications.

75. Husband and wife as witness for or against the other.

76. In actions for divorce.

77. In actions for criminal conversation.

78. In criminal cases.

79. Crimes committed against each other.

§ 72. **Preliminary.** “A husband or wife is not competent to testify against the other upon the trial of an action, or the hearing upon the merits of a special proceeding, founded upon an allegation of adultery, except to prove the marriage, or disprove the allegation of adultery. A husband or wife shall not be compelled, or without consent of the other, if living, allowed to disclose a confidential communication, made by one to the other, during marriage. In an action for criminal conversation, the plaintiff’s wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy, except that she cannot, without the plaintiff’s consent, disclose any confidential communication had or made between herself and the plaintiff.” Code Civ. Pro. § 831.

“The husband or wife of a person indicted or accused of a crime is in all cases a competent witness, on the examination or trial of such person ; but neither husband nor wife can be compelled to disclose a confidential com-

munication, made by one to the other during their marriage." Penal Code, § 715.

*Burden of proof.* It has been held that where the complaint is verified, the averments set forth in rule seventy-three are *prima facie* evidence, and the burden of proof is shifted upon the defendant, who must controvert the same as matter of affirmative defense. *Farace v. Farace*, 1 Civ. Pro. Rep. 419.

§ 73. **What are confidential communications.** Except as to the specific actions mentioned in the statute, a husband or wife is a competent witness for or against the other, except as to what are deemed confidential marital communications. Code Civ. Pro. § 828.

This was not the rule formerly, but recent statutes in this and most other states now place the husband and wife, generally speaking, in the same category as other witnesses. But these statutes, like our own, while granting competency to married persons to be witnesses for or against the other, do not affect the prohibition regarding confidential communications had between them; such cannot be disclosed. *Jones v. Simpson*, 59 Mo. 180; *Young v. Gilman*, 46 N. H. 186; *Reeves v. Herr*, 59 Id. 81; *Costello v. Costello*, 41 Ga. 613; *Moore v. Wingate*, 53 Mo. 398; *State v. McCord*, 8 Kan. 232; *Robinson v. Chadwick*, 22 Ohio St. 527; *Keater v. Dimmick*, 46 Barb. 158; *Montgomery v. Pickering*, 116 Mass. 227; *Barker v. Kuhn*, 38 Iowa, 395; *Lingo v. State*, 29 Ga. 470; *Griffin v. Smith*, 45 Ind. 366; *Walker v. Sanborn*, 46 Me. 470; *Cross v. Rutledge*, 81 Ill. 266; *Jennie v. Marble*, 37 Mich. 319; *Petmecky v. People*, 2 Cr. Rep. 450; *aff'd* 99 N. Y. 415; *Pillow v. Thomas*, 57 Tenn. 12; *U. S. v. Jones*, 32 Fed. Rep. 569.

The communications which a husband or wife are pro-

hibited from disclosing are such as are expressly made confidential, or are of that nature, or induced by the marital relation; they do not refer to ordinary conversations relating to matters of business; *Parkhurst v. Berdell*, 110 N. Y. 386; 15 Civ. Pro. Rep. 355; 18 St. Rep. 193.

A communication is confidential within the meaning of this section when it is of a character that it cannot be supposed that both husband and wife could have been willing to discuss the subject in the presence of others. *Warner v. P. P. Co.*, 132 N. Y. 181.

Thus, after marriage has been proved and admitted, neither husband nor wife can disprove that sexual relations existed between them during their married life. *R— v. Reading* (Eng.), Cas. Temp. Hardw. 79; *R— v. Luffe*, 8 East (Eng.), 192; *Wright v. Holgate* (Eng.), 3 C. & K. 158; *Murray v. Milner*, 12 Ch. D. 345. But where the marriage or date of birth of a child is in dispute, the evidence of the parents is competent both to show they never were married, or the birth of the child before marriage. *Murray v. Milner*, 12 Ch. D. 345. It was held that a wife cannot testify to matters for which if true her husband might be indicted. *Stewart v. Johnson*, 3 Harr. (N. J.) 87.

Also held, that a husband who contests his wife's will cannot testify to confidential communications had with his wife during marriage. *Maynard v. Vinton*, 59 Mich. 139. Nor, on a bill filed by a wife for moneys received by her for her husband, can she testify to the admissions of her husband. *Gray v. Gray*, 39 N. J. Eq. 511. Also, where the wife sought to show that her husband gave her money to take up certain notes. *Washington v. Bedford*, 10 Lea (Tenn.), 246.

In an action for libel a husband cannot testify as to

conversations he had with his wife, where such conversations might tend to show that an unlawful intimacy existed between the wife and a third party. *Warner v. P. P. Co.*, 132 N. Y. 181.

There are many authorities which hold that death does not remove the prohibition of the statutes. *Barnes v. Camack*, 1 Barb. 392; *Gray v. Cole*, 5 Harr. (Del.) 418; *Coffin v. Jones*, 13 Pick. (Mass.) 444; *Dexter v. Booth*, 2 Allen (Mass.), 559; *Cooke v. Grange*, 18 Ohio, 526; *Cornell v. Venarsdalen*, 4 Pa. St. 364; *Robb's Appeal*, 98 Pa. St. 501; *Cross v. Rutledge*, 81 Ill. 266; *Patton v. Wilson*, 2 Lea (Tenn.), 101; *Walker v. Sandborn*, 46 Me. 470; *Pillow v. Thomas*, 57 Tenn. 120; *Griffin v. Smith*, 45 Ind. 366; *Collins v. Mack*, 31 Ark. 684; *Lingo v. State*, 29 Ga. 470; *Spradling v. Conway*, 51 Mo. 51; *Williams v. Baldwin*, 7 Vt. 503; *Stein v. Bowman*, 13 Pet. (U. S.) 209; *Wood v. Chetwood*, 27 N. J. Eq. 311; *Aveson v. Kinnans* (Eng.), 6 East. 192; *O'Connor v. Majoribanks* (Eng.), 4 M. & G. 435. Thus held, that the husband of a deceased wife, could not testify in a suit against the interests of her succession to what took place during her lifetime. *Succession of Wade*, 21 La. Ann. 343. Also, where a deposition contained communications held by deponent and her husband during his lifetime, they were held incompetent. *French v. Wade*, 35 Kan. 391. Also held, that divorce does not unseal the lips of the former husband and wife in this respect. *Barnes v. Camack*, 1 Barb. 392; *Chamberlin v. People*, 23 N. Y. 85; *Ratcliff v. Wales*, 1 Hill, 63.

It has been held that the prohibition extends to confidential communications imparted by husband or wife to a third party. *Brown v. Wood*, 121 Mass. 137. Also, a conversation between husband and wife overheard by

small children, held to be privileged. *Jacobs v. Hester*, 113 Mass. 157. But held that a third person overhearing such conversations might testify thereto. *Gannon v. People*, 127 Ill. 518. Also, a wife is competent to testify to such declarations and statements made to third persons in her presence. *Mercer v. Patterson*, 41 Ind. 444. Neither are conversations between husband and wife in presence of third parties, or overheard by third parties, privileged. *Com. v. Giff*, 110 Mass. 181; *Floyd v. Miller*, 61 Ind. 224; *State v. Carter*, 35 Vt. 378; *Pratt v. Delavan*, 17 Iowa, 307; *Allison v. Barrow*, 3 Cold. (Tenn.) 414; *Fay v. Guynon*, 131 Mass. 31; *State v. Hoyt*, 47 Conn. 518, 540; *Keator v. Demmick*, 46 Barb. 158; *State v. Buffington*, 20 Kan. 599, 613. Nor a conversation between a prisoner and his wife. *Simon's Case* (Eng.), 6 C. & P. 332.

The fact of non-communication between husband and wife has also been held to be privileged. *Simon's Case* (Eng.), 6 C. & P. 332.

It has also been held that in all cases this privilege is personal, and does not attach to the subject-matter. *State v. Buffington*, 20 Kan. 599, 613; *Com. v. Giff*, 110 Mass. 181; *State v. Hoyt*, 47 Conn. 518; *State v. Carter*, 25 Vt. 378; *Allison v. Barrow*, 3 Cold. (Tenn.) 414.

§ 74. **What are not confidential communications.** All communications are not privileged, nor is everything which has taken place between a man and his wife during coverture deemed privileged.

Thus, where a bill was filed to set aside two deeds for fraud on the part of the husband, it was held that the wife was competent to testify to transactions with her husband. *Crimmins v. Crimmins*, 10 Alt. R. 800.

Also held, that there can be no secrets or confidences

between husband and wife regarding trust property held by one or both, which a court of equity will allow one of them to keep from the *cestui que trust*. *Wood v. Chitwood*, 27 N. J. Eq. 311. Also, that secrets disclosed in the ordinary course of business or the confidence of friendship are not privileged. *Wilson v. Rastall* (Eng.), 4 Ter. 758.

A declaration made by the defendant the second night after marriage that he did not love the plaintiff and had made a mistake in marrying her is not a privileged communication. *Fowler v. Fowler*, 33 St. Rep. 746 ; 19 Civ. Pro. Rep. 282.

Nor is a letter, written by the plaintiff and delivered to the defendant shortly before leaving him, giving her reasons for leaving, incompetent as a declaration made to defendant himself of facts which he had an opportunity to deny or excuse. *Id.* Nor a pretended confession of adultery made by the husband in the hope of rendering a similar confession from his wife. *Id.*

It has been held that the correspondence of a husband and wife, which is in control of a third party, may be used in evidence. *State v. Buffington*, 20 Kan. 599.

In an action for a separation on the ground of cruelty, where the defense sets up a counterclaim for adultery, the defendant may testify in detail as to a conversation had with the plaintiff, his wife, where it is competent on the issue ; where such issues are tried together this difficulty seems inherent. Testimony competent on either issue must be admitted. *Woodrick v. Woodrick*, 141 N. Y. 457.

Where insanity is the issue, it has been held that its exhibition is not a communication in the sense of being a voluntary confidence, and a wife can testify she noticed

nothing of the kind in her husband. *U. S. v. Guiteau*, 1 Mackey's Rep. 498.

It has also been held that this prohibition only relates to communications made between husband and wife during the existence of marital relations, and anything which may have been communicated by a man to a woman before his marriage to her is not privileged. *Otis v. Spencer*, 102 Ill. 622.

Nor do those made at the very time of marriage seem to come within the rule. *People v. Bertholf*, 24 Hun, 272; *Van Tuyl v. Van Tuyl*, 57 Barb. 235.

The words in the section, "except to prove the fact of marriage," refer to the marriage which took place between the parties, and it is not competent thereunder for a party to testify to a previous marriage, for the purpose of showing that her subsequent marriage to his adversary in the action was void. *Finn v. Finn*, 12 Hun, 339. See *Southwick v. Southwick*, 49 N. Y. 510.

§ 75. **Husband and wife as witnesses for or against the other.** In an action between husband and wife either is a witness for or against the other, save in the cases excepted in this section. Code Civ. Pro. § 828; *Birdsall v. Patterson*, 51 N. Y. 43; *Southwick v. Southwick*, 49 N. Y. 510; aff'g 2 Sween. 234; *Patterson v. N. Y. Cent. R. R. Co.*, 62 Barb. 364; *Wehrkamp v. Willett*, 1 Keyes, 250; *Bailey v. Bailey*, 41 Hun, 424; 3 St. Rep. 132; *Minier v. Minier*, 4 Lans. 421.

This section does not apply to cases where the couple have lived together without being married. *Dennis v. Crittenden*, 42 N. Y. 542.

In an action for a separation, where the plaintiff alleged the refusal of the defendant to allow her to return home, his slanders of her, and accusations made by

him of her unchastity, and the defendant alleges her adultery with a person named, at a certain place, which the plaintiff denies, it was held that the plaintiff could testify that there had been no impropriety between her and her alleged paramour. *De Meli v. De Meli*, 120 N. Y. 485 ; 31 St. Rep. 704 ; aff'g 11 Id. 291.

Also, where a wife brought an action against her husband to recover an alleged balance of moneys belonging to her and received by him as her agent, the defendant was allowed to testify to conversations with her in which she agreed that the sums so paid should apply as payment of certain bills by him. *Southwick v. Southwick*, 49 N. Y. 510. Also, where husband and wife were co-plaintiffs, it was held that the husband could give evidence in her favor upon the trial of the action. *Birdsall v. Patterson*, 51 N. Y. 43.

It was also held, in an action on a promissory note by an indorsee against the maker, that the wife of the payee might testify in favor of the maker. *Armstrong v. Noble*, 55 Vt. 428 ; *Morgan v. Hyatt*, 62 Ind. 560. Also, that the wife is competent to support the title of her husband's baillee. *Funk v. Dillon*, 21 Mo. 294. Also, where a woman applies property taken upon execution against her husband, she may testify in her own behalf. *Furrow v. Chapin*, 13 Kan. 107. Also, where the defendant in replevin pleads the ownership of his wife, she may prove the same. *McNail v. Leigler*, 68 Ill. 224.

In actions brought against railroad corporations for injury to the wife, the husband was held a competent witness in her behalf. *Matteson v. N. Y. Cent. R. R. Co.*, 62 Barb. 364.

§ 76. In actions for divorce. In actions for divorce,



a party is not confined to denials, but may testify to affirmative facts to disprove the allegations of adultery. *Stevens v. Stevens*, 54 Hun, 490 ; 27 St. Rep. 602 ; 8 Supp. 47 ; *Irsch v. Irsch*, 12 Civ. Pro. 181. Or to avoid the inference to be drawn therefrom. *Steffens v. Steffens*, 33 St. Rep. 643 ; 11 Supp. 424 ; 19 Civ. Pro. 267.

The husband or wife can testify to any fact or circumstance within his or her knowledge, competent and material on the question as to whether the act as charged was committed. *Huntly v. Huntly*, 73 Hun, 261 ; 26 Supp. 266.

Also held, that in spite of this section, a husband or wife is competent as a witness in favor of the other, in an action for divorce on the ground of adultery. *Bailey v. Bailey*, 41 Hun, 424 ; 3 St. Rep. 132.

Also held, that the testimony of the wife as to the fact of adultery will not be considered even when no objection was taken by the defendant. *Fanning v. Fanning*, 20 Supp. 849.

Confessions of adultery made by a defendant and proved on the trial, and which are not denied by him, will warrant a decree of divorce. *Sigel v. Sigel*, 20 Supp. 377.

But a husband cannot testify to the material facts tending to establish the adultery of his wife. *Colwell v. Colwell*, 14 App. Div. 80 ; 43 Supp. 439 ; 77 St. Rep. 439.

When the plaintiff brings an action for divorce, and the answer puts in issue the residence of the plaintiff at the time of the commission of the adultery and the commencement of the action, the plaintiff is incompetent to testify as to such facts. *Dickinson v. Dickinson*, 63 Hun, 516 ; 45 St. Rep. 323.

In an action for an absolute divorce, in which counter

charges of adultery are made in the answer, testimony of the plaintiff which is competent upon the issues presented by the answer is admissible, although incompetent, upon the charges made by the complaint. *McCarthy v. McCarthy*, 143 N. Y. 235 ; 62 St. Rep. 184.

§ 77. **In actions for criminal conversation.** This section does not apply where the husband seeks damages for criminal conversation, and he may give testimony in his own behalf relating to the fact at issue. *Smith v. O'Brien*, 24 St. Rep. 708 ; 6 Supp. 174 ; *Woods v. Gledhill*, 56 Hun, 220 ; 31 St. Rep. 103 ; 9 Supp. 266. In an action for criminal conversation, a plaintiff's divorced wife is a competent witness for him to prove the marriage and offense. *Wottrich v. Freeman*, 71 N. Y. 601 ; *Ratcliffe v. Wales*, 1 Hill, 63 ; *Dickerman v. Graves*, 6 Cush. (Mass.) 309.

But a wife cannot testify in favor of her husband in actions of this nature. Civ. Code, § 831. *Cornelius v. Hambay*, 150 Pa. St. 359 ; *Fratini v. Caslini*, 66 Vt. 273.

§ 78. **In criminal cases.** Under section seven hundred and fifteen of the Penal Code, a husband or wife of the person on trial for a crime is a competent witness for or against the other.

Thus, on the trial of a husband for murder, his wife is a competent witness against him. *People v. Petmecky*, 2 N. Y. Cr. Rep. 458 ; aff'd 99 N. Y. 415. Also held, that letters from the defendant to his wife are competent. *Id.*

On a trial for bigamy, the wife of the defendant may testify to the marriage and cohabitation. *People v. Wentworth*, 4 Cr. Rep. 210.

Upon a trial for murder, where the defense was in-

sanity, the testimony of the defendant's wife to matters tending to show an adequate cause for the state of his mind existing subsequent thereto is competent. *People v. Wood*, 36 St. Rep. 952.

The right to object to the competency of the wife as to the giving of evidence of confidential communications from the defendant, her husband, remains also with the husband, and upon his objecting she can neither be compelled nor allowed to testify to such matters. *Id.*

§ 79. **Crimes committed against each other.** Either party is competent against the other in cases of crimes committed by one against the other. *People v. Northrupp*, 50 Barb. 149 ; *People v. Carpenter*, 9 Id. 580 ; *People v. Fitzpatrick*, 5 Park. 20. Thus, a wife is a competent witness against her husband for shooting at her. *Reg. v. Pearce* (Eng.), 9 C. & P. 907 ; also for attempting to poison her. *People v. Northrupp*, 50 Barb. 147 ; *Com. v. Sapp* (Ky.), 14 S. W. Rep. 834 ; she is also a competent witness against her husband upon a charge of procuring a miscarriage. *State v. Dyer*, 59 Me. 303. Also, where he is upon trial for assault upon her, she may so testify. *Johnson v. State*, 94 Ala. 53 ; *Tucker v. State*, 71 Id. 342 ; *Turner v. State*, 60 Miss. 351 ; *Whipp v. State*, 34 Ohio St. 87 ; *State v. Davis*, 3 Brev. (S. Car.) 3 ; *Com. v. Murphy*, 4 Allen (Mass.), 491 ; *U. S. v. Fitton*, 4 Cranch (C. C.) 658 ; *U. S. v. Smallwood*, 5 Id. 35 ; *Rex v. Azire* (Eng.), 1 Stra. 633. Also, where he is upon trial for assisting another man to commit a rape upon her. *Rex v. Castlehaven*, 1 St. Tr. 393.

The wife is also competent to prove acts of cruelty committed by her husband. *People v. Mercein*, 8 Paige, 46.

In an action for separation, husband and wife are held

to be as competent as other witnesses. *Casey v. Casey*, 4 Daly, 270.

Where the husband is the person injured by his wife, he may also testify against her. *Whipp v. State*, 34 Ohio St. 87 ; *State v. Davidson*, 77 N. C. 522.

Thus, when the wife struck her husband with an axe, the husband was held competent to give evidence against her. *State v. Davidson*, 77 N. C. 522.

## CHAPTER VII.

### CONFESSIONS.

- Sec. 80. Statute regulating.  
81. Preliminary.  
82. Knowledge of the language requisite.  
83. Weight of.  
84. Its weight for the jury.  
85. Identity of declarant must be proved.  
86. Confession must be voluntary.  
87. Induced by threats or compulsion.  
88. Illustrations.  
89. Threat or promise made indirectly.  
90. Confessions induced by promise of reward or favor, or given under a stipulation.  
91. Confessions of guilt other than the crime charged, made under inducements as to the latter.  
92. Inducements by one in authority.  
93. Statement made under duress.  
94. Induced by artifice or fraud.  
95. To officer or other person, while under arrest.  
96. Statements made before coroner.  
97. Judicial confessions.  
98. Statement, how taken.  
99. Statement unavailable for the defense.  
100. When the court holds a preliminary examination to determine competency of confession.

§ 80. **Statute regulating.** “A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without ad-

ditional proof that the crime charged has been committed." Crim. Code, § 395.

This statute was intended to apply only to voluntary confessions, and not to change the statutory rules relating to the examination of persons charged with a crime. *People v. Mondon*, 103 N. Y. 211; 4 Cr. Rep. 559; *People v. Chapleau*, 121 N. Y. 266; 30 St. Rep. 992; *People v. McCallam*, 3 Cr. Rep. 189; aff'd 103 N. Y. 583.

"The admission of a member of an aggregate corporation, who is not a party, shall not be received as evidence against the corporation, unless it was made concerning, and while engaged in, a transaction, in which he was the authorized agent of the corporation." Code Civ. Pro. § 839.

Confessions are also divided into verbal or written; and the question of weight to be attached to them is, generally speaking, dependent upon the class the particular declaration belongs to.

There are, of course, many instances, in which, from the peculiar circumstances surrounding the case, a written confession may be entitled to much less credence than many verbal statements; but, as a general rule, the contrary is the case, and oral confessions must be carefully scrutinized before implicit confidence should be accorded them.

There are many substantial reasons for the observance of this caution,—in the first place the confession does not come to the court and jury first hand, but comes through the medium of a third party, upon whose trustworthiness its entire value depends. It is not enough that the witnesses be honest and sincerely desirous of telling the exact truth, for, unfortunately, all

these elements may be present, and yet the version, as detailed by them, be very far from the statement received. There must be taken into consideration the infirmity of the human memory, the liability to misapprehension of the real meaning of the phrases used, or indeed the inability of the party himself to correctly express his true wishes. It is, therefore, absolutely indispensable that the witness should have thoroughly understood the declarant, and that the latter was fully aware, both of what he was doing, and also the meaning of the language he was employing.

§ 82. **Knowledge of the language requisite.** Under ordinary circumstances it would be an unnecessary requirement that it should appear that the witness was conversant with the language spoken by the declarant, and was able to converse intelligently with him in that language; but where the witness and declarant are of different nationalities, it must appear that the language used was understood by them both. Thus, where it was shown that the witness had a very imperfect knowledge of the language, it was held to disqualify him from testifying to a conversation in which a confession was made, the whole of which was not understood by him. *People v. Gillabert*, 39 Cal. 663.

However, it must not be understood that the witness is required to be very proficient in the tongue used; it is sufficient if he is conversant enough with it to understand what the person says, or the substance, or the declarant is able to express himself in the language of the witness sufficiently well to convey his meaning to the witness. *Berry v. Com.*, 10 Bush (Ky.), 15. Thus, where the witness, called to detail the confession made to him by the defendant, said, "He talked in very broken Eng-

lish, and told me substantially as I have related it here, as near as I can get at it," it was held to be fairly inferred that the witness understood the defendant. *People v. Minisci*, 46 Hun (N. Y.), 682.

Where the confession was made partly in German and partly in English, and the witness did not understand German, it was held admissible, the court stating, "If the witness had said that a part of the same admission was in German and part in English, I think the evidence would have been inadmissible. But it appears the admissions were at the police office, after the prisoner had been searched and the bills found; it does not appear that any portion of the admissions were in German." *People v. Thomas*, 3 Park (N. Y.), 256.

It is also necessary, irrespective of the language in which the confession is couched, that the person to whom it was made, or heard it, should also be able to remember distinctly the material parts of the admission. The exact words, the whole of the conversation, or that he in fact heard all that the accused said in the same conversation, is not necessary to entitle the witness to give what he did hear in evidence, provided what he testifies to was substantially the conversation he heard. *State v. Avery*, 31 La. Ann. 181; *Eskbridge v. State*, 26 Ala. 30; *Kendall v. State*, 65 Id. 492; *State v. Pratt*, 88 N. C. 639; *Berry v. Com.*, 10 Bush (Ky.), 15; *Taylor v. Com.* (Pa.), 18 A. Rep. 558.

Where, however, only part of the conversation has been given by a witness, the defendant has the right to put in evidence all the rest or remainder of that same conversation which goes to explain or qualify that portion testified to. *Platner v. Platner*, 78 N. Y. 90; *State v. Huson*, 3 Sneed, 691; *Real v. People*, 42 N. Y. 270;



*State v. Mock*, 48 Wis. 271; *State v. Brown*, 1 Mo. App. 86.

Thus, where the charge was extortion, and a witness for the prosecution testified to a confession by the accused to him at a certain time and place, which was in substance that the prisoner admitted to him some of the facts and circumstances at issue, and also stated that his extortion was committed for the purpose of being revenged upon the prosecutor for a wrong received, the prisoner was held competent to state the whole conversation which took place between him and the witness. *People v. Penhollow*, 42 Hun, 103.

This conversation, however, must be the identical one already referred to, for subsequent conversations or statements made at other times are not competent to qualify or explain the one given in evidence. *Real v. People*, 42 N. Y. 270.

The condition of the defendant when he made his confession must also be taken into consideration in determining its value. His mental faculties may be disordered to such a degree as to preclude all idea of rational narrative, or his physical disability may render him unable to comprehend the nature of his statement, or, in his terror, words may unwittingly fall from his lips which are liable to a construction foreign to his intention, or he may even, in his fear and confusion, accuse himself and others of a crime of which they are innocent. An instance of this is seen in the celebrated case of the two Booms, who were convicted of the murder of their brother-in-law. They had a violent quarrel with their relative in a field, during which they felled him to the ground with clubs. He was seen no more by the neighbors, who suspected that he was murdered.

Seven years after, this suspicion was roused to a great extent by some foolish person's dreams, and the subsequent finding of some articles belonging to the supposed murdered man concealed upon the premises of the accused, and also in a hollow stump some bones were discovered. The accused, upon being arrested and tried, confessed their guilt and were condemned to die. Fortunately for them, before the day of execution the brother-in-law was found. *N. Am. Review*, vol. x., p. 418. There are also cases where a confession has been made by an innocent party in order to shield the guilty one. *Warickshall's Case*, 1 Leach, Cr. Cases (Eng.), 299, *n*.

Therefore, it is observed that two elements enter into the consideration of a confession, and upon which its importance entirely depends,—the truth of the confession itself and the testifying character of the witness who repeats it upon the witness stand.

§ 83. **Weight of.** Most of the reasons for cautious scrutiny in regard to reception of confessions are removed and cease to apply when the confession is the deliberate act of the defendant, and only made as the result of calm, collected and careful thought. When a confession bears imprinted upon it such conditions, it becomes at once the most effectual evidence possible to obtain. *People v. Bennett*, 37 N. Y. 133.

§ 84. **Its weight for the jury.** The amount of credit to which a confession is entitled is a matter for the consideration of the jury, and their determination must depend largely upon the circumstances which arise in each case. Any evidence which goes to support its credibility can be introduced by the people, and such evidence as may tend to destroy its claim to belief, or establish

the illegality of its procurement, is proper on the part of the defense,—such as unlawful inducements, intoxication, insanity and the like. *People v. Kertz*, 42 Hun, 336.

§ 85. **Identity of declarant must be proved.** It is self-evident that no confession can be received in evidence against the defendant, unless absolute proof of his identity with the declarant be established. Therefore the person to whom the confession was made must show that the accused was the author of the admissions, and that he and no other made the confession which he formerly received and now details upon the witness stand.

No particular mode of identification is required, any satisfactory means or manner of so doing are sufficient for that purpose. Thus a witness was allowed to give in evidence a confession which was made to him by the defendant, who was invisible to him at the time, through a soil pipe, he being able to swear to his identity by knowledge of the sound of his voice. *Brown v. Com.*, 76 Pa. St. 319.

Identity can also be proved by a confession of that fact, made by the person arrested to the sheriff, provided such confession was not obtained in any of the ways which by law exclude evidence of confessions from being employed. *State v. Foster*, 36 La. Ann. 877.

§ 86. **Confession must be voluntary.** There is one most essential qualification, which applies alike to all confessions of whatsoever nature and kind they may be, or how and where made, and that is, they must have been entirely free and voluntary in their inception. The existence of any fact, which robs a statement of this indispensable attribute, at once destroys its efficacy and

stamps its incompetency. It is absolutely necessary that it was a free-will offering on the part of the wrongdoer, caused by the desire on his part to sincerely and truthfully state his connection with the crime of which he stands charged, and not a statement forced from him by any apprehensions of personal injury, or determined upon by reason of the influence exerted upon him of promise of money consideration, or hope of favor or reward. The existence of perfect freedom to act, with the mind unbiased by hope of gain or governed by fear, must have been present, and thus afforded the declarant an opportunity of choosing, and a freedom of choice, or the confession will not be admitted. *People v. Druse*, 103 N. Y. 655; *People v. Mondon*, Id. 211; Cr. Code, § 395; *Cox v. People*, 80 N. Y. 500; *Owen v. State*, 78 Ala. 425; *Beery v. U. S.*, 21 Col. 186; *State v. Guild*, 10 N. J. L. (5 Halst.) 163; Tex. Cr. Code, Art. 662; *People v. Phillips*, 42 N. Y. 200; *People v. Wentz*, 37 N. Y. 309; *People v. McMahon*, 15 N. Y. 384; *Yates v. State*, 47 Ark. 172; *State v. Potter*, 18 Conn. 166; *State v. Carrick*, 16 Nev. 120; *People v. Porton*, 49 Cal. 632; *State v. Bostick*, 4 Harr. (Del.) 563; *Price v. State*, 18 Ohio St. 418; *Metzger v. State*, 18 Fla. 481; *Byrd v. State*, 68 Ga. 661; *Larose v. Com.*, 84 Pa. St. 200; *Brown v. People*, 91 Ill. 506; *State v. Freeman*, 12 Ind. 100; *State v. Gossett*, 9 Rich. (S. C.) L. 428; *State v. Sopher*, 70 Iowa, 494; *Rector v. Com.*, 80 Ky. 468; *State v. Rigsby*, 6 Lea (Tenn.), 554; *State v. Wilson*, 3 La. Ann. 497; *Nicholson v. State*, 38 Md. 140; *Grosse v. State*, 11 Tex. App. 364; *Com. v. Nott*, 135 Mass. 269; *Lambert v. State*, 23 Miss. 322; *State v. Day*, 55 Vt. 510; *Hector v. State*, 2 Mo. 166; *State v. Brockman*, 46 Mo. 566; *State v. Simon*, 50 Id. 370; *State v. Hopkirk*, 84 Mo. 278; *State v.*

*Squires*, 48 N. H. 364; *Thompson v. Com.*, 20 Gratt. (Va.), 724; *State v. Hogan*, 54 Mo. 192; *State v. Jones*, Id. 478.

It has been held that if no inducements have been held out, the confession will not be rejected because the declarant was not entirely without hope or fear. *State v. Staley*, 14 Minn. 105. This is correct, if nothing has been done by any one to produce the fear which he feels, and if the fear is of that nature which arises not from any outside influence, but is adduced from innate apprehension arising from the knowledge of guilt and dread of the natural consequences of the act. Thus the fear of legal punishment which the fact of being arrested inspires, or seeing the evil he has occasioned, or being confronted with the evidences of his guilt, do not come under that definition of fear which the law declares will invalidate a confession. *People v. Thoms*, 3 Park, 256; *Allen v. State*, 12 Tex. App. 190.

Neither is a confession to be excluded by reason of the condition of mind of the accused induced by a knowledge of the public indignation or popular excitement over the commission of the crime. *People v. Kurtz*, 42 Hun, 355; *Honeycutt v. State*, 8 Baxt. (Tenn.) 371.

The great care which the law exercises in this respect, to secure complete freedom from compulsion, relates to anything which savors in the least degree of coercion. Thus where the grand jury causes the one whose case they are investigating to come before them and testify therein, it has been held that no statement which he may there make can be used subsequently against him, and that, too, notwithstanding the fact that prior to giving his testimony he was fully warned according to the terms of the statute. *People v. Singer*, 5 Cr. Rep. 1.

The ground held by the court is, that it was not a free act on his part, but being brought before that body against his wish, he was, in fact, compelled to give testimony against himself.

§ 87. **Confessions induced by threats or compulsion.**

As has already been stated, the confession, to be of any service against the defendant upon his trial, must be a free act on his part, and not one induced by coercion or threats. Also, if the circumstances under which he made it tend to create the presumption that such apprehensions surrounded the declarant at the time, his confession will not be allowed in evidence, for not only must there be an entire absence of all threats, but in addition there must not appear any act or acts which would create the suspicion of the employment of coercion to gain the object aimed at. Where such suspicious circumstances do exist, it becomes the duty of the prosecution to remove them, for upon it then devolves the burden of proof. This requirement is universal, and no confession extorted by fear produced by threats or coercion is allowable. N. Y. Code Cr. Pro. § 395 ; *Hector v. State*, 2 Mo. 165 ; *State v. Simon*, 50 Id. 370 ; *State v. Hagan*, 54 Mo. 172 ; *State v. Jones*, Id. 478 ; *State v. Guy*, 69 Id. 430 ; *State v. Hopkirk*, 84 Id. 278 ; *State v. Anderson*, 96 Id. 241 ; *People v. Ah Ki*, 20 Cal. 177 ; *Sarah v. State*, 28 Ga. 576 ; *Warren v. State*, 29 Tex. 369 ; *Greer v. State*, 31 Id. 129 ; *Elizabeth v. State*, 27 Id. 329 ; *State v. Cowan*, 7 Ired. (N. C.) L. 339 ; *State v. Motley*, 7 Rich. (S. C.) 327 ; *Gates v. People*, 14 Ill. 433 ; *U. S. v. Richards*, 2 Cranch. C. Ct. 439 ; *People v. Hoy Ten*, 34 Col. 176 ; *Janes v. Com.*, 2 Metc. (Ky.) 30 ; *Frederick v. State*, 3 W. Va. 695 ; *U. S. v. Humphreys*, 1 Cranch. C. Ct. 74 ; *Miller v. State*, 40 Ala. 54 ; *Rutherford v. Com.*, 2 Metc.

(Ky.) 387 ; *Spears v. Ohio*, 2 Ohio St. 583 ; *State v. Nelson*, 3 La. Ann. 497 ; *State v. Grant*, 21 Me. 171 ; *State v. Bostwick*, 4 Harr. (Del.) 563 ; *Com. v. Taylor*, 5 Cush. (Mass.) 605 ; *Stephen v. State*, 11 Ga. 225 ; *Jordan v. State*, 32 Miss. 302 ; *Miller v. People*, 39 Ill. 457 ; *People v. Smith*, 15 Cal. 408 ; *Smith v. State*, 10 Ind. 106 ; *Melvy v. State*, 3 Coldw. (Tenn.) 362 ; *State v. Guild*, 10 N. J. L. (5 Halst.) 163 ; *State v. Walker*, 34 Vt. 296 ; *State v. Day*, 55 Vt. 510 ; *State v. Revelle*, 34 La. Ann. 381.

The threats, however, must have been made prior to, or at, the time the confession is made, and not subsequent thereto, or they have no bearing upon the competency of the confession. *Kellinberger v. People*, 9 Colo. 233. It has also been held that the fact that threats were formerly made does not render the confession incompetent, if it is shown that all influence of fear from such threats was removed when the confession was subsequently made. *Walker v. State*, 9 Tex. App. 38. Where threats have been made, however, the burden falls upon the prosecution of showing the confession was not due to such threats. *Cain v. State*, 18 Tex. 387.

The threats must also be of a nature to awake some apprehension of a personal injury, not a pecuniary one. Thus a confession which the accused made of a larceny committed by him, under threat by the owner of bringing a civil suit against him for the same goods, was allowed upon the trial of the defendant for such larceny. *Capper v. U. S.*, 1 Marr. (Iowa) 259.

Also, the law does not regard acts which could only awaken fears in the breast of the guilty, and could by no means create apprehension in the mind of innocence. Thus the fact that the accused was compelled to touch

the body of the man whom he was at that time accused of murdering, and that from the agitated feelings engendered from that proceeding he made a confession, was held not to be a ground for rejecting it. *People v. Johnson*, 2 Wheel. Cr. Cases, 378.

§ 88. **Illustrations.** The defendant was indicted for the theft of money, promissory notes and receipts. He confessed in the following words: "Yes, I took it then, but did not hide it when you said I did. I hid it at a different time." The evidence showed that the confession was not the result of any promise of benefit to the accused, but it was the result of fear of legal punishment. The confession was held competent. *Gentry v. State*, 5 S. W. Rep. 660. Three persons to whom confession were made testified that no threats nor promises were offered, but that the confessions were free and voluntary. The defendant contended that they were extorted by mob violence. The only evidence to support this claim was given by one witness that there was excitement in the village that day, and more or less talk of violence; but no demonstration occurred, nor did it appear that the defendant was alarmed thereby. Held, that the confessions were properly admitted. *State v. Anderson* (Mo.), 9 S. W. Rep. 636. Also, where the officer making the arrest told the defendant that he had enough to convict her, and that she might consider herself under arrest, the court held that the language did not in itself constitute a threat which would rob the confession of its voluntary character. *People v. McCallam*, 5 Cr. Rep. 143; *aff'd* 103 N. Y. 587.

Also, where the prisoner appeared, when arrested, very much frightened, yet where it was evident that this state of mind resulted from the fact of the arrest, and not from any threats made by individuals, such fear does not



prevent his confession, made while in that state, from being competent. *People v. Thomas*, 3 Park, 269.

Also, where the prisoner, who was charged with murder, after his arrest and commitment to jail, was brought into the sheriff's office and asked by that officer if he desired to make any statements as to his whereabouts on the day of the murder ; that if he did, he would take it down in writing. The accused replied that he did, and thereupon made a statement. The court held it was a voluntary one. *Murphy v. People*, 63 N. Y. 590. Also held, that the mere fact that the feet of the accused were tied at the time of the making of the confession does not render it inadmissible. *State v. Patterson*, 73 Mo. 695.

Also, where the accused was told by the officer, after he was under arrest, that "he was in a bad fix, and had got caught at last," the court held that the confession he thereupon made was competent. *People v. Wentz*, 37 N. Y. 304.

The confession also held competent where the defendant, after being arrested, was told by an inspector of police that he (the prisoner) was charged with the murder, and that he, the inspector, had been watching him since the shooting, and had seen him try to steal a barrel of whisky the night before his arrest. He also told him about the pledging of the pistol, which the defendant had pawned the day after the murder, and which was supposed to have been the weapon with which the deed was committed. *People v. McGloin*, 91 N. Y. 241.

Where the conduct of the officer who makes the arrest is such that it was held it might have been sufficiently threatening to elicit a confession, the court rejected the confession made. *Say v. State*, 6 Baxt.

Tenn.), 244. Thus, where one policeman said to another who was accused of larceny, in the presence of the superintendent of police, "You had better own up. I was in the place when you took it; we have got you down fine; this is not the first you have taken; we have got other things against you nearly as good as this," the confession thereupon made was held to be incompetent. *Com. v. Nott*, 135 Mass. 269. Also, where a mistress locked up her seventeen year old servant in out-house until she confessed herself guilty of the arson charged against her, the court held it was not voluntary but due to compulsion. *Hoover v. State*, 81 Ala. 51. On a trial for the murder of a child by drowning, it appeared that the prisoner had been told that she had to tell what she had done with the child, and that otherwise they would get after her about it. The prisoner had then accompanied the sheriff to a stream, in which the body was afterwards found, and said if any one wanted their negroes drowned to bring them to her. The court held that the confession was made under menace, and was not admissible. *State v. Crowson* (N. C.), 4 S. E. Rep. 143. But where the defendant was arrested, tied and brought to the house of his employer in another county, where one of the vests which was stolen was found upon him, which being shown to him by his employer, who at the same time said, "Where did you get that vest?" "From you, sir," was the reply, this statement was allowed. *State v. Sanders*, 84 N. C. 728. Where the prosecutor and several others pursued the prisoner, shooting several times at him, before they succeeded in capturing him, the confession which he made immediately after his capture was ruled out upon his trial as not being voluntarily made. *Com. v. Coffee*, 108 Mass. 283. But the

mere fact that the person who made the arrest was armed with a gun, which he carried at present arms, does not exclude a confession which the defendant makes to him. *McElroy v. State*, 75 Ala. 9. Nor where the defendant had surrendered to the prosecutor, who had drawn his gun on him, and after walking with him two miles, on assurance that he would be protected, confessed his guilt of the crime, such confession was admitted. *Nelson v. State*, 3 Heisk. (Tenn.), 232. Where an eighteen-year-old boy, in the hands of unauthorized captors who had put a rope around his neck, confessed the murder, the confession was excluded as being extorted by fear, and the court held that its incompetency was not cured by the fact that, prior to making it, the mob told him it might be used against him. *State v. Revels*, 34 La. Ann. 381.

Where the defendant, who was accused of murder, was brought handcuffed by officers to the place where the relatives of the deceased were, and threats were made, and abusive language used against him, but the officers assured him of their protection, his confession made while still handcuffed was held to be competent in evidence against him. *Honeycutt v. State*, 8 Baxt. (Tenn.) 371.

§ 89. **Threat or promise made indirectly.** It seems that it is not necessary that the threat or promise made use of should have been directly made to the prisoner in order to exclude a confession made by him subsequently, but it is sufficient if such inducements were made to one who, from the peculiar relations existing between him and the prisoner, would be naturally supposed to communicate the same to the accused. *Rex v. Harding* (Eng.), 1 Ann. M. & O. 340.

§ 90. **Confessions induced by promise of reward or favor, or given under a stipulation.** Any confession which was made by reason of any inducements being held out to the declarant in any manner or way whatever, of obtaining any material benefit, other than one of a moral character, excludes the subsequent use of that confession. *State v. Simon*, 50 Mo. 370 ; *State v. Hogan*, 54 Id. 192 ; *State v. Jones*, 54 Mo. 478 ; *State v. Phelps*, 74 Id. 128 ; *State v. Hopkirk*, 84 Mo. 278 ; *People v. Wentz*, 37 N. Y. 309 ; *State v. Day*, 53 Vt. 510 ; *State v. Lowhorne*, 66 N. C. 538 ; 1 Greenleaf Ev. 14th Ed. § 219 ; 3 Russ. Cr. 368. Thus it has been held that such an inducement exists, where the confession was obtained by the complainant having promised the defendant that if he would confess to him his guilt, he would refrain from prosecuting him for the crime. Upon the subsequent violation of his word by the prosecutor who proceeded with the action, it was not permitted to him to use the confession he so obtained by his lying promise. *Smith v. State*, 10 Grat. (Va.) 734 ; *Boyd v. State*, 2 Humph. (Tenn.), 39 ; *State v. Lowhorne*, 66 N. C. 538 ; *Murphy v. State*, 63 Ala. 1.

Where the prisoner was visited during the night, in his cell, by three persons in succession, who were none of them officials, but who held out promises of favor to obtain a confession, the court refused to receive the confession, saying : " No reliance can be placed upon admissions of guilt so obtained ; for the very obvious reason that they are not made because they are true, but because, whether true or false, the accused is led to believe it is for his interest to make them." *People v. Wolcott*, 51 Mich. 612. But a statement made by a defendant to two of his bondsmen that he was short in his

accounts, at the time when he was not charged with the crime or under arrest, or any promise made to shield him from a criminal prosecution, is competent. *State v. Carrick*, 16 Nev. 120.

One suspected of a crime, and arrested, on protesting his innocence, was released. He was called before the grand jury for three successive days, being kept under strict guard, the jurors urging him strongly to tell the truth, and promising him protection. He made a statement implicating others, and was then removed, under guard, no one being allowed access to him. The state's attorney assured him that the state would deal fairly with him if he would tell the whole truth. The next morning, while waiting to be called before the grand jury, three persons were admitted to him, who urged him to make a fuller statement; whereupon he read them a confession for the grand jury. The court held that such confession was traceable to inducement. *People v. Wolcott*, 51 Mich. 612.

While the defendant, who was accused of a murder, was at the station-house, and after a watch belonging to the murdered woman had been found upon him, he was asked by an officer where the remainder of the jewelry was. He replied that he did not know anything about it. The officer having afterwards repeated the question, the accused said to him, "Will you do me a favor?" The officer answered, "I will if I can; I sympathize with you, and I pity you; you are in a bad fix."

The prisoner requested him to send his clothes to his mother, and then, in answer to questions by another person, made a confession. The court held no illegal inducement had been held out, and that the confession was allowable. *Cox v. People*, 19 Hun, 430; aff'd 80 N. Y. 500.

Also, when the defendant after his arrest was informed by the district attorney that he need not make those certain statements, which he subsequently did make, as they would probably be used against him, the statement so made was held voluntary, and therefore admissible. *Willett v. People*, 27 Hun, 469.

It seems to be the general rule that where the defendant is offered immunity from punishment by the district attorney, or by words led to believe he will receive a modification of his punishment, if he will make a complete and full confession of all the details and particulars of the crime under investigation, and that thereupon, relying upon such promise, he does make a true statement, the law prohibits the future use of the same against him. N. Y. Code Cr. Pro. § 395; *People v. O'Neil*, 5 N. Y. Cr. R. 303; 3 Russ. Cr. 373; *Com. v. Knapp*, 9 Pick. (Mass.) 496; *Newman v. State*, 49 Ala. 9; *Simmons v. State*, 61 Miss. 243; *Nomack v. State*, 16 Tex. App. 178; *State v. Johnson*, 30 La. Ann. Part II. 881; *People v. Wolcott*, 51 Mich. 612; *Porter v. State*, 55 Ala. 95; *State v. Phelps*, 11 Vt. 116. The rule is so rigid in this respect, that anything said or done whereby the accused might reasonably suppose that he was giving his testimony under such a promise is sufficient to exclude it. Thus where the detective who brought the accused from another state to the one where the crime was committed said in answer to his often repeated question, "What benefit am I to get out of this thing?" "That there could be no promise made to him; that the only benefit he could get out of the thing, so far as he could see, was the benefit any state witness got." Afterward, in the office of the district attorney of the trial county, and in his presence, he said to the defendant,

“If you want to make a statement to the district attorney you can do it ; you can use your own judgment as to whether you want to make a statement or not ; the district attorney will make you no promises.” Thereupon the district attorney said, “Any statement you may make must be voluntary, and you can make one or not as you please.” Thereupon the defendant made a confession which was held to be incompetent, the court saying : “And in looking at this question we must remember the principle of morals, that a promise must be taken against the prisoner, in the sense in which he believed, or should have believed, it was understood by the promisee. It cannot be permitted that the district attorney, or any one who may justly be believed to act for him, can use language which he must have thought would be understood by the prisoner as an assurance of freedom from prosecution, and can thereby obtain a confession, and yet that the people can use that confession, because before the confession was actually made the district attorney said he could make no promises.” *People v. Kurtz*, 42 Hun, 335.

In a similar case the court said : “A more serious offense was committed in the efforts to obtain the confession than the respondent was guilty of, even if his confession was true, as it was a perversion of the process of the law—poisoning of the foundation of justice.” *Flagg v. People*, 40 Mich. 706. Also, where the district attorney testified that “he may have said to him that he might be used as a state’s witness,” the court rejected the confession. *State v. Johnson*, 30 La. Ann. Part II. 881.

But where one against whom a charge was being investigated by the grand jury appeared and offered him-

self as a witness, and though told by the district attorney that he could not be compelled to give his evidence, he still expressed his willingness to testify, was sworn and confessed the crime, this confession was declared to be admissible against him upon his trial. *U. S. v. Kirkwood* (Utah), 13 Pac. Rep. 234. Also, where the district attorney informed the prisoner after his arrest that he need not make certain statements which he did make or they would probably be used against him, his statement, thereafter made, was admitted. *Willett v. People*, 27 Hun, 469 ; aff'd 92 N. Y. 29.

It has been held that where an offer to confess has been made and rejected, and no confession made, that such offer can be put in evidence. *Perkins v. State*, 60 Ala. 7.

It would seem that any statement that the accused might make, after the district attorney has withdrawn his promise, would not be considered as affected by the promise and would be admitted in evidence. *Simmons v. State*, 61 Miss. 243 ; *Rex v. Cleves* (Eng.), 4 C. & P. 221.

But it has been held, where the accused has already made a confession under a stipulation with the prosecuting officer that he should receive favor, a subsequent withdrawal of such promise will not render another confession made thereafter competent, unless the prisoner has first had it clearly explained to him that the confession he made under promise could not be used against him. *Porter v. State*, 55 Ala. 95.

There is another question which arises in this connection, and that is, if after the defendant has been promised immunity if he would confess and testify against his associates, and he does so confess, but thereafter refuses



to testify against his fellows, can his confession be used against him upon his own trial ?

There is no settled uniform rule regarding this question, and in those cases where this point has been raised, we have decisions both in the affirmative and negative. Holding the affirmative: *Com. v. Knapp*, 10 Pick. (Mass.) 478; *State v. Moran* (Ore.), 14 Pac. Rep. 419; *Rex v. Rudd* (Eng.), Cowp. 331; *Rex v. Burley* (Eng.), 2 Stark. Ev. 13; *Rex v. Moore* (Eng.), 2 Lew. C. C. 37; *Contra*: *Allison*, Proc. Cr. Law of Scotland, 453; *Wornack v. State*, 16 Tex. App. 178; *Neely v. State*, 22 Id. 324; *Lopez v. State*, 10 Id. 190.

This section applies only to confessions of the principal, and does not prevent an accomplice who has been promised immunity if he would confess, from giving his testimony against his fellow. *People v. O'Neil*, 5 Cr. Rep. 303.

Before a confession is received in evidence the defendant is entitled to show that it was obtained from him through fear and by promise of immunity. Permitting him to show such facts afterwards and then striking out the confession is not sufficient. *People v. Fox*, 121 N. Y. 440.

§ 91. **Confessions of guilt other than the one charged, made under inducements as to the latter.** The fact that illegal inducements are held out to one charged with a certain specified crime, with intent to make him confess that crime, if successful, does, as has been seen, exclude the use of any statement relating to his connection with that crime, which he may make under such circumstances. Another question arises, however, if such prisoner, under such inducements, does not confess to his participation in the crime about which he is interrogated, but does

acknowledge his guilt of some other and different crime of which he was not suspected or at least not accused. It seems that where the crime he confesses to is so entirely distinct from that in which the efforts to secure a confession are made as to be completely unconnected with it, that then such confession is admissible in evidence, if he is placed upon trial for the commission of that latter crime. *State v. Underwood*, 75 Mo. 230; *Com. v. Whittmore*, 11 Gray (Mass.), 201.

The crime confessed must, however, be so unconnected with the one in which the illegal efforts to secure a confession are made, that it cannot be in any degree affected or influenced thereby. Where such is not the case, the statement is excluded upon a trial for either offense. *Rex v. Hearn* (Eng.), 1 C. & M. 109; *Grosse v. State*, 11 Tex. App. 563.

Confessions which the prisoner may make of his guilt as to other crimes, are not admissible upon his trial for the crime charged, as affecting his credibility, character, or for any purpose whatever. *State v. Symonds*, 57 Me. 148; *Sutton v. Johnson*, 62 Ill. 209.

§ 92. **Inducements by one in authority.** The inducements which are made by a private person, or by one who holds some position of authority or power to perform his threat or promise, vary widely in their effect. When such are held out to the prisoner by the latter class of persons, the character of the medium through which they come serves to render all confessions or statements made by reason thereof useless as evidence against the accused. A threat or promise has no effect, unless backed up with the will and ability to carry it out, but when delivered to the defendant by one who possesses such power, the fears which are excited on the one hand by

the threats, or the hopes aroused by the promises, serve at once to destroy all voluntary impulses, and as a rule vitiates the statement. *People v. Wentz*, 37 N. Y. 303; *Spicer v. State*, 69 Ala. 159; *Austine v. People*, 51 Ill. 236; *State v. Day*, 55 Vt. 570; *People v. Barrie*, 49 Cal. 342; *Young v. Com.*, 8 Bush (Ky.), 366; *Vaughan v. Com.*, 17 Gratt. (Va.), 576; *Com. v. Culver*, 126 Mass. 464; *State v. York*, 37 N. H. 175; *Reg v. Taylor* (Eng.), 8 Car. & P. 733; *State v. Lowhome*, 66 N. C. 639; *State v. Wintzgerode*, 9 Oreg. 153; *State v. Kirby*, 1 Strobb. (S. C.) L. 155; *Wilson v. State*, 3 Heisk. (Tenn.), 232. It is important, therefore, not only to discover whether threats or illegal inducements were used, but also by whom and to whom.

The question has not been generally decided if the threats or promises which are made to a prisoner are such as could be carried out only by a person clothed with authority so to do, it has any remedial effect upon a confession obtained thereby, that the person so making them did not occupy the position he pretended to, and in fact possessed no power to make good his words. The fact being that the prisoner at the time did really believe him to be a person holding authority and able to carry out his threats, it would seem that sound reasoning ought to exclude them. Indeed there is one decision which goes to sustain this view. *People v. Wolcott*, 51 Mich. 612.

§ 93. **Statements made under duress.** The same grounds which exist for the exclusion of a statement induced by threats appear in one extorted while the defendant was under duress, and render such a confession fatally defective. The duress meant by the statute must be a personal restraint exercised over the person of

the defendant contrary to his will and desire. A legal restraint, such as the incarceration of a person, legally committed or detained in jail, is not such a duress as can operate to the extent of invalidating any statement of the prisoner, which he may make while he is in that manner deprived of his liberty. The test seems to be, was the situation of the defendant such, that his loss of liberty was in itself a ground of apprehension of some personal harm, was the act which put him under restraint lawless, and illegal treatment reasonably to be inferred? If these conditions are present no act of his is binding, or words uttered by him to be used adversely to his interests.

Thus on an indictment for arson, it appeared the defendant was a colored girl about seventeen years old, who was a servant of the prosecutrix, and of weak mental capacity, humble and docile in her disposition, and it also appeared that the prosecutrix had whipped her on several occasions. After the fire, the prosecutrix locked the defendant up in an outhouse, and then said to her, "Now, I reckon you will tell me something about burning the house; I believe you know all about it," on which defendant confessed the arson. The court held that this confession was made under duress, as was also a similar statement made by her to another person, while she was thus confined, and that the admission in evidence of such confession was reversible error. *Hoover v. State* (Ala.), 1 So. Rep. 574. Thus also where a boy eighteen years of age was captured by a mob, who put a rope around his neck, the confession he made then was rejected. *State v. Revels*, 34 La. Ann. 381. The guard in whose custody the defendant was put a rope around his neck and hung him up twice, when he confessed his guilt,

and the next day was taken before a magistrate, accompanied by two of the same guard, and there repeated his confession. The court held it inadmissible, since the confession was originally extorted from him by duress, and it did not clearly appear that the latter statement was not made under the influence which induced the former. *Coffee v. State* (Fla.), 6 So. Rep. 493.

Where, however, the defendant made a confession of incest to the daughter's husband under duress, but afterwards made the same confession to another person, when not threatened or menaced, such latter confession is properly admitted. *Matthis v. Com.* (Ky.), 13 S. W. Rep. 360.

§ 94. **Induced by artifice or fraud.** A confession which was obtained by any artifice or fraud practised upon the accused, provided it is not of that nature which would arouse feelings of apprehension on his part, or create such sentiments as might cause him to make a false statement, is not inadmissible because obtained in such a manner. *Balbo v. People*, 80 N. Y. 484; *State v. Staley*, 14 Min. 105; *State v. Hopkirk*, 84 Mo. 278; *State v. Brooks*, 92 Id. 542; *State v. Rush*, 95 Id. 199; *Price v. State*, 18 Ohio St. 418; *People v. Druse*, 103 N. Y. 655; *State v. Phelps*, 74 Mo. 128; *Jefferds v. People*, 5 Park, 522; *Com. v. Hanlon*, 3 Brewst. (Pa.) 461. Nor indeed does it affect its competency, that it was obtained by deception, the prisoner having been misled as to the object and character of the officer. *Jefferds v. People*, 5 Park, 522. Where a prisoner is falsely told that his accomplice has been arrested, or has confessed, the confession he thereupon makes by reason of this untruth will be allowed, although such misrepresentations were made for the sole purpose of mak-

ing the defendant so do. *People v. Druse*, 41 Hun, 640 ; 103 N. Y. 655 ; *Price v. State*, 18 Ohio St. 418 ; *State v. Jones*, 54 Mo. 478.

Also, a detective, who in order to obtain a confession from one accused of a crime, disguises himself as a confederate, or personates one also under the ban of the law, can detail such admissions as were made to him under the belief that his assumed character was what it purported to be. *Campbell v. Com.*, 84 Pa. St. 187 ; *Ztate v. McLean*, 36 Iowa, 343 ; *Com. v. Wood*, 1 Gray (Mass.), 86 ; *State v. Brooks* (Mo.), 5 S. W. Rep. 257.

Also, held allowable to give the confession in evidence, which was obtained from the prisoner by falsely telling him his accomplices are in custody, or where he made it by reason of laboring under the mistaken supposition that they were. *Rex v. Burley* (Eng.), East T. 1818.

Also, where a confession was made by the accused, while confined in jail awaiting trial, to a detective placed there upon a fictitious charge of crime in order to ingratiate himself with and obtain the defendant's confidence, is admissible on the trial of the defendant. *State v. Brooks* (Mo.), 5 S. W. Rep. 257.

Also, where the prisoner asked the turnkey if he would put a letter in the box for him, and upon his promising to do so, gave him the letter, which the turnkey detained. Held admissible to use it upon the trial. *Rex v. Darlington* (Eng.), 2 C. & P. 418.

But where defendant testified upon her cross-examination that a certain letter offered as a confession was written at her mother's request, who came to the jail with another, and told her she had consulted a lawyer, who advised the writing of the letter, the court held that she has the right to prove by her mother and the

other person, that at the conference she told them she was innocent of the alleged crime, since the conference and writing of the letter should be considered as one transaction, and should all go to the jury. *People v. Yeaton* (Cal.), 17 Pac. Rep. 544.

Where the accused gives a letter to another upon his promise to deliver the same to the address desired, or for the purpose of mailing, and which instead of so doing he opens, the contents are permitted in evidence. *People v. McMahon*, 15 N. Y. 384, 391.

§ 95. **To officer, or other person while under arrest.** The rule is almost general, that the mere naked fact, that at the time the defendant made a confession he was under arrest, and made it to the officer who apprehended him, or to some other custodian, does not render it inadmissible, unless indeed other disqualifying facts appear. N. Y. Code Cr. Pro. § 395; *People v. Rogers*, 18 N. Y. 9; *Woodford v. People*, 62 N. Y. 117; *O'Brien v. People*, 48 Barb. 274; *Hartming v. People*, 4 Park, 319; *Murphy v. People*, 63 N. Y. 590; *People v. Deacons*, 109 N. Y. 374; *People v. Chacun*, 102 N. Y. 669; aff'g 3 N. Y. Cr. R. 418; *People v. Cox*, 80 N. Y. 515; *People v. Druse*, 103 N. Y. 655; *People v. Jaehne*, 103 Id. 182; *Anderson v. State*, 25 Neb. 550; *Rizzolo v. Com.*, 126 Pa. St. 154; *Dodson v. State*, 86 Ala. 60; *Com. v. Holt*, 121 Mass. 61; *Harding v. State*, 54 Ind. 359; *State v. Demarest*, 41 La. Ann. 617; *Bailey v. State*, 80 Ga. 359; *State v. Sopher* (Iowa), 30 N. W. Rep. 917; *Wolf v. Com.* 30 Grat. (Va.), 833; *State v. McLaughlin*, 44 Iowa, 82; *King v. State*, 40 Ala. 314; *State v. Suggs*, 89 N. C. 527; *State v. Patterson*, 73 Mo. 695; *State v. Carlisle*, 57 Mo. 102; *McCabe v. Com.* (Pa.), 8 Atlantic R. 45; *Ross v. State* (Md.), 10 A. Rep. 218; *State v. Rush* (Mo.), 8 S.

W. Rep. 221; *Com. v. Knapp*, 9 Pick. (Mass.), 496; *State v. Guy*, 69 Mo. 430; *Jackson v. State*, 59 Ala. 249; *Hopt v. Utah*, 110 U. S. 574; *Massey v. State*, 10 Tex. App. 645; *contra*, *Baker v. State* (Tex.), 8 S. W. Rep. 23; *State v. Phelps*, 11 Vt. 116; *State v. George*, 15 La. Ann. 145.

Thus, it has been stated by the court where this question arose, "There being no inducement, promise, threat or menace used to obtain the confession, or influence its being made, it is very clear, upon principle and authority, that it was properly admitted." *People v. Wentz*, 37 N. Y. 303. Also upon the same point by Judge Denio: "The objection to the testimony of the policeman assumes that no admission by a person accused of crime, made to an officer who has him in custody, can be received. It was not pretended that any threats, promises or other inducements to make a confession had been held out to the prisoner, but the objection was placed distinctly upon the ground first mentioned. I have looked carefully into all the cases referred to by the defendant's counsel in support of that position, and many others, and do not find that it has ever been held that the single fact of the prisoner being in custody was sufficient to exclude his declaration, whether made to the officer or third persons. On the contrary, many of the cases, upon the competency of confessions, show that the prisoner was in custody at the time, and the question generally has been, whether the confession was voluntary, or was influenced by what was said to him by the officer or by others." *People v. Rogers*, 18 N. Y. 9. Also: "No authority has been referred to which holds that a statement made under these circumstances is inadmissible. The prisoner was at that time



under arrest upon the charge of having committed the murder, and the statement was made to the officer in whose actual custody he had been up to the time that he was brought to the jail. But a statement made by a prisoner is not involuntary because made after his arrest to the officer who arrested him, and though made while in his actual custody." *Murphy v. People*, 63 N. Y. 590. Also held, on a trial for murder, that the testimony of the officers who arrested the defendant, of an admission by him that he committed the crime, is competent when it appears that the admission was made voluntarily, and without the influence of hope or fear, and not even in response to questions asked by the officers. *State v. Sopher* (Iowa), 30 N. W. Rep. 917. Also held, that the confession made by the defendant to the officer who holds him in custody is admissible in evidence against him, if it was fully and voluntarily made, and totally disconnected from any previous conversation or communication on the subject. *State v. Demarest*, 41 La. Ann. 617. To the same effect, held that evidence of a confession made by the defendant when he was arrested, there having been no threats or inducements made, except that in response to his request for advice he was told that if he was guilty, he "had better tell about it," but if not guilty he "ought not to own up," is admissible. *Dodson v. State*, 86 Ala. 60. Also, where the defendant was confined in jail, the confession he made to the sheriff was held admissible, where that officer testifies that such admission was made on the defendant's own motion, and without question or suggestion. *People v. Gastro*, 75 Mich. 127. In a trial for larceny, a policeman testified that after he had arrested the defendant and another, they disputed over the matter, and he said to them that

whichever one stole this vest should confess it, and defendant said, "I took the vest." He also swore that no inducement or threat was made to procure the confession. It was held admissible. *Bailey v. State*, 80 Ga. 359.

Also, where the defendant made criminating admissions upon being told by an officer having him in custody that his co-defendant had implicated him, but it did not appear that such admissions were induced by promises, threats or intimidation, the court held the admissions competent. *State v. Rush* (Mo.), 8 S. W. Rep. 221. So also held admissible when induced by the officer having the defendant in custody, and who persuaded him that the evidence was sufficient to convict him, and that if he confessed he might possibly escape with a lighter punishment. *People v. Deacons*, 109 N. Y. 374.

Upon this subject the court has said: "It is not sufficient to exclude a confession by a prisoner that he was under arrest at the time, or that it was made to an officer in whose custody he was, or in answer to questions put by him, or that it was made under hope or promise of a collateral nature." *People v. Cox*, 80 N. Y. 515. In a case of arson, the officer went into the room where the prisoner was confined, and told him he was in a bad fix, and had got caught at last. He then asked him to tell him who the others were, and in the course of conversation with the prisoner, the latter asked him if they had got one D. and G. The officer asked him if they knew anything about it, and he said they did. The officer then asked the prisoner what was the first fire he was interested in. He said the first fire he had anything to do with was his father's barn, and that the next was the barn of one P., saying that he and the said G. set that

on fire. The court held that as no promise or inducements had been held out to the prisoner, his confession was wholly voluntary. *People v. Wentz*, 37 N. Y. 303.

Also, where the prisoner was charged with murder, and was under arrest in jail, the officer asked him if he wished to make a statement as to his whereabouts on the night of the murder, and told him if he did he would reduce it to writing. The witness replied he did, and then made a statement. The court held that it was voluntary and admissible in evidence. *People v. Murphy*, 63 N. Y. 590.

§ 96. **Statements made before coroner.** Whether or not the statement which the defendant made before the coroner, during the investigation into the cause of the death of the person for which crime he is undergoing trial, can be used against him, depends upon the fact as to whether he was under arrest for that murder at the time he testified, and, if so, whether his examination was conducted according to the statutory requirements. If he was not in custody at the time, charged with the commission of that crime, the testimony which he gave or the statement which he made, under oath though it be, is available against him upon his final trial. *Hendrickson v. People*, 10 N. Y. 9; *People v. Mondon*, 103 N. Y. 211; *People v. Thayer*, 1 Park, 595; *People v. Macleraney*, 6 Id. 49; *Clough v. State*, 7 Neb. 320; *State v. Taylor* (Kan.), 13 P. R. 550; *People v. Teachout*, 41 N. Y. 7. This competency is not affected by reason of the fact that at that time he rested under suspicion of being the author of the crime, even if it appears that at the time he was testifying he himself was aware that he was suspected. *Id.*

But a different aspect is presented if, at the time the

coroner is holding an inquest, it is known that a crime has been committed, and the defendant is also in custody accused of committing it, or as the supposed criminal. In that case his examination must proceed in strict conformity to the statute, and any substantial deviation therefrom prevents the use of his statement against him thereafter. *People v. Mondon*, 103 N. Y. 211 ; *People v. McMahon*, 15 N. Y. 384 ; Crim. Code, §§ 188, 196, 198 ; *Wood v. State* (Tex.), 3 S. W. Rep. 336.

On a trial for an indictment for murder, it appeared that the prisoner, who was an ignorant Italian laborer, unfamiliar with the English language, was arrested, without warrant, as the suspected murderer, and while under arrest was taken by the officer having him in charge before a coroner's inquest, and, after proof had been given of the homicide, was examined on oath by the district attorney and the coroner as to circumstances tending to connect him with the crime. It did not appear that he was informed he was not bound to answer questions tending to criminate himself. The prosecution was permitted on the trial to prove under objections and exceptions the statements so made by the prisoner. On appeal it was held fatal error. *People v. Mondon*, 103 N. Y. 211.

But where the defendant was called and sworn at an inquest held over the body of his wife, and at the time no suspicion attached to him as her murderer, nor was it even suspected that the wife had died from poison ; the *post mortem* was not made until the following day, and it was not until the second day thereafter that defendant was arrested charged with the crime ; the court held, that as his statement had been made before he was charged with the crime, and was not in custody at the

time, it was admissible in evidence against him. *Hendrickson v. People*, 10 N. Y. 12.

Also, where the defendant appeared at a coroner's inquest over his wife. At this time he was not under arrest, but knew he was suspected of the crime, having been told before he testified, by some one present, that "it was charged that his wife had been poisoned, and that he was the man that was going to be arrested for the crime." Before he was sworn the coroner also informed him, "that there were rumors that his wife came to her death by foul means and that some of these rumors implicated him." He thereupon went upon the stand and testified, and his statements were held competent in evidence against him upon his trial. *Teachout v. People*, 41 N. Y. 7.

But where a constable took a man, without a warrant, and charged with the murder of his wife, before a coroner who was holding the inquest, by whom he was sworn and examined as a witness, his statement was held inadmissible on his trial for her murder. *People v. McMahon*, 15 N. Y. 384.

Where the accused has appeared under arrest before the coroner, charged with the crime, and has been treated in every respect as one on his preliminary examination before a magistrate, it therefore appears any statement he then makes must be taken without the administering of an oath, in order to render it available thereafter upon the trial. *People v. Mondon*, 103 N. Y. 211; *People v. Martinez*, 66 Cal. 278; *State v. Garvey*, 25 La. Ann. 191; *People v. McMahon*, 15 N. Y. 384; *Rex v. Lewis* (Eng.), 6 C. & P. 161; *Rex v. Davis* (Eng.), Id. 177; *Wheiting's Case*, 8 Id. 238.

Thus, where the defendant was accused of murder in

the first degree, and before the coroner's inquest requested to make a statement. He had first been informed by that official as to his rights, and that any statement he might make might be used against him. He made a statement, which was reduced to writing, but which he afterwards refused to sign. It was held that such statement was admissible against him on his trial for the homicide. *People v. Chapleau*, 121 N. Y. 266; 30 St. Rep. 989.

A confession made under oath, by a person under arrest, is not inadmissible merely because it was made before one who was a coroner, if not made during a judicial proceeding. Thus, where the defendant was in jail under an indictment for murder, and told an official he would like to make a statement. The latter said, that in that case he would send for the coroner to take it. The coroner was summoned to police headquarters where the accused was confined, and took down his statement under oath. It was held that the coroner was merely acting as a clerk or scribe, and that the confession was admissible. *People v. McGloin*, 91 N. Y. 241.

§ 97. **Judicial confessions.** Confessions are also divided into judicial and extra-judicial. A judicial confession is one which is made by the accused before a court of competent jurisdiction, and one in which the prosecution there pending had been properly instituted, and touching which the admission in question is made. In order to render available admissions or confessions made by the accused before a magistrate, the proceedings must have been conducted strictly according to law.

“When the defendant is brought before a magistrate upon an arrest, either with or without warrant, on a

charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had." Crim. Code, § 188. See also *Matter of Ramscar*, 63 How. Pr. 255; *People v. Mondon*, 103 N. Y. 221; 4 Cr. Rep. 561; *People v. Palmer*, 43 Hun, 407; 2 Cr. Rep. 106; *People v. Penhollow*, 5 Cr. Rep. 41; 42 Hun, 103; *People ex rel. Burgess v. Risley*, 66 How. Pr. 67.

Where a defendant made a statement before the magistrate before whom he was brought, who did not inform him of his rights, the statement was not admitted in evidence on his trial. *Coffee v. State* (Fla.), 6 So. Rep. 493.

The magistrate must also "inform the defendant that it is his right to make a statement in relation to the charge against him (stating to him the nature thereof); that the statement is designed to enable him, if he sees fit, to answer the charge, and to explain the facts alleged against him; that he is at liberty to waive making a statement, and that his waiver cannot be used against him upon his trial." Crim. Code, § 196.

It is strictly requisite, in order to constitute the statement made by the accused upon his preliminary examination before the magistrate admissible against him, that the magistrate inform him of the fact, that while he was at liberty to make such statement, yet he was not obliged to do so, nor answer any questions, and that a failure on his part so to do would not militate against him. *State v. Roric*, 74 N. C. 148; *People v. Kelly*, 47 Cal. 125; *Wilson v. State* (Ala.), 4 So. Rep. 383; *Kirby v. State* (Tex.), 55 St. Rep. 165; *People v. McMahon*, 2 Park (N. Y.), 669, 670; *People v. Hendrickson*, 1 Id. 416; *State v. Lamb*, 28 Mo. 218. Where it does

not appear affirmatively that the defendant had been cautioned by the magistrate as required by the Code, it will not be presumed that the magistrate failed in his duty in that respect. *People v. Stott*, 5 Cr. Rep. 61.

§ 98. **Statement, how taken.** "If the defendant chooses to make a statement, the magistrate must proceed to take it in writing, without oath, and put to the defendant the following questions only:

"What is your name and age?

"Where were you born?

"Where do you reside, and how long have you resided there?

"What is your business or profession?

"Give any explanation you may think proper, of the circumstances appearing on the testimony against you, and state any facts which you think will tend to your exculpation." Crim. Code, § 198.

*Must not be under oath.* It is absolutely essential to the competency of the statement as evidence, that it was not taken under oath. *People v. Mondon*, 103 N. Y. 221; 4 Cr. Rep. 561; *People v. McMahon*, 15 N. Y. 384; *State v. Garvey*, 25 La. Ann. 191; *People v. McMahan*, 51 Pa. St. 384; *State v. Boughton*, 7 Ired. (N. C.) 96; *Walker v. State* (Tex.), 12 S. W. Rep. 503; *Com. v. Harrman*, 4 Barr, 269.

It has been held, however, that where, during the investigation, the defendant was sworn and testified, the court laboring under the error that the accused was a witness rather than the defendant, and upon discovering the mistake the statement was destroyed, the subsequent statement which the defendant made before the same magistrate after being properly cautioned by him was allowed in evidence. *Rex v. Webb* (Eng.), 4 C. &



P. 564. It was also held, where the defendant had testified upon a preliminary examination before the magistrate who was investigating the crime, and before he had been charged with its commission, that his testimony so given could be used against him upon his final trial. *Clough v. State*, 7 Neb. 320.

The English decisions, however, seem to hold directly the contrary. Thus where several persons, among whom was the accused, against whom at that time there was no specific charge, were examined under oath before a committing magistrate in regard to the crime, and he made a statement in common with the others. Subsequently he was committed for trial by the magistrate, and upon his trial the court refused to allow his statement to be used against him. *Rex v. Lewis* (Eng.), 6 C. & P. 161; *Reg. v. Whaley*, 8 Id. 250; *Reg. v. Owen*, 9 Id. 238.

This statement of the defendant must not be confounded with testimony given upon a trial, for where on a trial the defendant voluntarily goes upon the stand and testifies in his own behalf, the statements thus made, though under oath, are admissible against him. *People v. Kelley*, 47 Cal. 125; *Dickerson v. State*, 48 Miss. 288; *Com. v. Clark*, 130 Pa. St. 641.

The disqualification prescribed by the rule only applies to statements which are made during judicial investigations or proceedings, but such a statement is perfectly competent against the defendant, unless both the oath and statement were given upon an examination conducted by a magistrate, to investigate the very crime for the commission of which the defendant was at that time charged. *People v. McGloin*, 1 N. Y. Cr. R. 105; *aff'd* 91 N. Y. 211; *People v. Teachout*, 42 Id. 7.

*The magistrate must not question the defendant.* The Code provides that only those questions therein mentioned shall be asked the defendant, when he desires to make his statement.

Those facts which the defendant wishes to state must be allowed to come voluntarily from his lips unprompted or unsuggested by the magistrate. No more than he wishes to state should be forced from him by any inquisitorial process on the part of the magistrate. *Crim. Code*, § 198; *Com. v. Harriman*, 4 Barr. 269; *Wilson v. State* (Ala.), 4 So. Rep. 383.

§ 99. **Statement unavailable for the defense.** The statement which the defendant makes cannot, it seems, be available in his behalf, nor be used on his trial to corroborate his testimony there given. *Wilson v. State*, 2 Swan. 237.

The statement may, however, be used upon the defendant's trial when an attempt is made to show a variance between his testimony and the statement, and the defendant has also the right to insist upon the whole of the statement being given in evidence, when the prosecution only seeks to introduce a portion thereof. *U. S. v. Wilson*, 1 Bald. 78, 96; *U. S. v. Barlow*, 1 Cranch. C. C. 94; *U. S. v. Prior*, 5 Id. 37; *William v. State*, 39 Ala. 552; *State v. Isaac*, 3 La. Ann. 359; *Tipton v. State*, Peck. (Tenn.), 308; *Crawford v. State*, 4 Coldw. (Tenn.) 190.

§ 100. **When the court holds a preliminary examination to determine competency of confession.** Where a confession is offered in evidence, and an objection is made, the duty devolves upon the prosecution of making preliminary proof as to its voluntary character. *Nicholson v. State*, 38 Md. 140; *State v. Garvey*, 28 La.

Ann. 925 ; *Thompson's Case*, 20 Gratt. (Va.) 724 ; *People v. De Soto*, 49 Cal. 69 ; *Barnes v. State*, 36 Tex. 356 ; *People v. Kurtz*, 42 Hun, 336. The rule is that before any confession can be received in evidence in a criminal case, the defendant is entitled to show that it was not voluntary, or was obtained from him through fear or promise of immunity. It is not enough to allow him to make such proof afterwards, and then strike out the confession. *People v. Fox*, 121 N. Y. 449 ; *Amos v. State* (Ala.), 3 So. Rep. 749 ; *State v. Kinder*, 96 Mo. 548 ; *State v. Anderson*, Id. 241. This rule does not require such preliminary proof, where no objection is made to the admissibility of the evidence. *State v. Davis*, 34 La. Ann. 35 ; *Eberhart v. State*, 47 Ga. 548, 608. Of course if it appears from the evidence itself that the element of any illegal inducement exists, or suspicion aroused as to its voluntary character, the proof necessary to render it competent must be adduced by the prosecution. But where there is nothing on the surface to raise the suspicion that the confession is not the voluntary act of the accused and no objection made, but on the contrary there exists a total absence of all circumstances tending to impart an involuntary character to the confession, it is presumed to be voluntary, and a *prima facie* case is made out as to the voluntary character of the confession. *Hopt v. Utah*, 110 U. S. 574, 584 ; *State v. Meyers*, 99 Mo. 107.

But where the defense does offer objections as to its competency, that fact must first be settled by the court on a preliminary examination. *Willett v. People*, 27 Hun, 469 ; *People v. Kurtz*, 42 Hun, 335 ; *Hector v. State*, 2 Mo. 166 ; *State v. Patterson*, 73 Mo. 695 ; *Rufer v. State*, 25 Ohio St. 463 ; *Simmons v. State*, 61 Miss. 243 ;

*Murray v. State* (Fla.), 6 So. Rep. 498 ; *State v. Monnan*, (S. C.), 2 S. E. Rep. 621 ; *Briscoe v. State* (Md.), 8 A. Rep. 571 ; *Nolen v. State*, 8 Tex. App. 585 ; *Brown v. State*, 71 Ind. 470 ; *State v. Konder*, 96 Mo. 548 ; *U. S. v. Stone*, 2 Cr. L. Mag. 769, 794.

While the question as to the voluntary character of a confession is for the court, yet where this is a question of fact, depending on conflicting evidence, it should be submitted to the jury. *People v. Kurtz*, 42 Hun, 336 ; *Com. v. Piper*, 120 Mass. 185 ; *Com. v. Coffee*, 108 Mass. 285 ; *People v. Barker* (Mich.), 27 N. W. Rep. 539 ; *Stallings v. Georgia*, 47 Ga. 572 ; *Volkavitch v. Com.* (Pa.), 12 Atl. Rep. 84.

As to whether this examination should take place in the presence and hearing of the jury, the authorities differ. Thus it has been held, that where the defendant so requests, the court should conduct such preliminary examination out of the presence and hearing of the jury. *Ellis v. State* (Miss.), 3 So. Rep. 188 ; *Carter v. State*, 37 Tex. 362. Other authorities hold that it may be conducted in the jury's hearing. *Holsenbake v. State*, 45 Ga. 43.

Upon the trial of this question, the accused has the same rights as upon the trial of any other issue, and he is entitled to offer any evidence to show by what illegal inducements his confession was obtained. *People v. Fox*, 50 Hun (N. Y.), 604 ; *State v. Kinder*, 96 Mo. 548 ; *Com. v. Culver*, 126 Mass. 464 ; *Brown v. State*, 70 Ind. 576. Thus, where the judge held a preliminary examination to determine this question, and excluded testimony offered by the defendant to prove that his confession was obtained through fear and compulsion, it was held to be reversible error. *State v. Kinder*, 96 Mo.

548. It has been also held that the testimony of the defendant, showing the illegal character of the confession upon which he bases his objection to its admission in evidence, should be offered while that issue is pending, and if not given before his testifying in his own behalf before the jury, it affords no ground for excluding the admissions. *State v. Rush*, 95 Mo. 199. This, however, does not appear to be the general practice, but on the contrary it is held, that if at any time during the trial it appears that the confession was obtained by the inducements which the law declares renders a confession inadmissible, the court will, on motion, strike it from the case. *Bob v. State*, 32 Ala. 560 ; *Metzger v. State*, 18 Fla. 491 ; *Ellis v. State* (Miss.), 3 So. Rep. 188.

Upon this preliminary examination, the counsel for the defendant may also cross-examine the witness, or he may cross-examine a witness who is about to detail the confession, in advance.

Where the court has admitted the confession in evidence, either party is entitled to introduce all the evidence submitted to the court on the preliminary examination as to its admissibility, and also every other circumstance may be shown pertinent to the issue, or relating to the weight or credit to be given to the confession, and if at any time before the close of the case, it should be shown that the confession was obtained in such a manner, or under such circumstances as to render it incompetent, it must be excluded. *Ellis v. State* (Miss.), 3 So. Rep. 188. Where the accused has made several distinct confessions, at different times, the state cannot be required to prove that the first was voluntary, before interrogating witnesses as to the others. *State v. Washington* (La.), 4 So. Rep. 864.

However, where confessions are shown to have been obtained through improper influence, such influences will be presumed to enter into and give color to all subsequent confessions, unless the contrary is clearly shown. *Murray v. State* (Fla.), 6 So. Rep. 498 ; *Barnes v. State*, 36 Tex. 256 ; *State v. Drake*, 82 N. C. 592 ; *State v. Brown*, 73 Mo. 631.

It has been held that it may be shown that the confession is competent, from the fact that the original improper influence used had ceased to exist at the time, either by lapse of time or other circumstances. *U. S. v. Wardell*, 4 Mack. (U. S.), 503 ; *State v. Guild*, 5 Halst. (N. J.) 163.

# INDEX.

---

	PAGE
<b>ACCOMPLICE—</b>	
definition of. ....	58-60
as a witness. ....	48-50
privileges of. ....	49, 51
cross-examination of. ....	50-51
must be corroborated. ....	51-54
extent of corroboration. ....	54-58
decoys, detectives and spies are not. ....	60
<b>ACCUSATIONS—</b>	
witness cannot be cross-examined as to. ....	31
<b>ACTIONS—</b>	
by heirs. ....	80, 100
against heirs. ....	128
by assignee of executor. ....	106
by creditors. ....	75, 107
against creditors. ....	76
by devisee. ....	128
against devisee. ....	104
by attorney for services to deceased. ....	110, 125
against administrator. ....	66, 111
by administrator ou behalf of creditors. ....	128
by administrator to recover gifts <i>causa mortis</i> . ....	131
by same to recover gifts <i>inter vivos</i> . ....	131
by executors against creditors. ....	75, 76
by executors against lessees. ....	73, 74
by executors to foreclose a mortgage. ....	85, 86
by executors on notes. ....	93
by executor to recover goods claimed as a gift. ....	101
by executors against executors of a firm. ....	92
against executors on a note. ....	90, 93
against executor of deceased partner. ....	94
against executor for services to deceased. ....	109, 113

ACTIONS—*Continued.*

PAGE

against executors of firm.....	92
against executor in individual capacity .....	102
by mortgagee .....	130
by lessees against executor.....	73, 74
by one deriving title or interest.....	135
on promissory notes .....	89, 130
by a survivor against or joint maker.....	87-94
to avoid a deed.....	102
against corporations.....	103
on an insurance policy.....	106
husband and wife for or against the other.....	205
same for divorce.....	206
by husband for <i>crim. con.</i> .....	208
criminal cases by husband or wife.....	209
witness in, for illegal sale of thing in action.....	38
by partners against executors of a firm.....	92
between personal representatives of deceased partners.....	98
by personal representatives of partners on a note.....	130
against partners on a note .....	89
by surviving partner .....	94
against survivor.....	95

## ADMINISTRATION. (See ADMINISTRATOR.)

## ADMINISTRATOR. (See EXECUTOR.)

statute affecting .....	66
who cannot testify against .....	66
when examined in own behalf.....	66
when declarations of, not evidence .....	73
cannot testify to his own claim against estate.....	76
testimony against, in action on notes .....	88
testimony of, in action on notes.....	89, 130
effect of cross-examination by his attorney of an adverse witness .....	102
may testify to physical condition and appearance of deceased	105
admissions by.....	107
action against.....	111
cannot testify to conversations had before his appointment .	119
evidence as to his alleged intestate being alive.....	120
trustees cannot testify against.....	119



	PAGE
<b>ADMINISTRATOR—Continued.</b>	
restrictions upon.....	131
claim against one claiming by gift.....	131
claim for services on his accounting .....	132
action against one "deriving title or interest".....	135
cannot avail of the statute when.....	136
regarding declarations of deceased .....	137
when his evidence restores competency.....	157
when it does not have that effect .....	158
<b>AGENT—</b>	
when does not come within the statute .....	84
rule regarding a deceased.....	84
may avail himself of statute, when.....	84
when present at conversation with deceased .....	124
conversation between his principal and deceased.....	127
communications to, when privileged.....	167
<b>APPEARANCE—</b>	
of deceased, when cannot be shown.....	80, 105
when administrator may testify to.....	105
<b>ARREST—</b>	
witness cannot be examined as to.....	31
statements made while under.....	237
before coroner, while under.....	241
before magistrates, while under.....	244
statement, how made .....	246
<b>ASSIGNEE—</b>	
of executor, actions by .....	106
of deceased, actions by .....	107
of devisee.....	128
of mortgagee.....	130
<b>ATTORNEY—</b>	
when statute does not apply to.....	67
when statute does apply to .....	68
actions by, for legal services to deceased.....	110
lien for costs does not disqualify .....	122
nor being an executor.....	122

**ATTORNEY—Continued.**

in action for service cannot testify to conversation of de- ceased and third parties in his presence.....	125
communications to, privileged.....	165, 170
what communications are not.....	174
what relations must exist.....	167
cessation of relations.....	168
objection to testimony of.....	169
who decides relationship and privilege.....	170
on probate of will.....	178
waiver of privilege.....	179
stenographer within statute.....	165
law clerk of, within the statute.....	167
law student of.....	167

**ATTORNEY'S CLERK—**

cannot divulge communications.....	165, 166
------------------------------------	----------

**ATTORNEY'S STENOGRAPHER—**

cannot divulge communications.....	165
------------------------------------	-----

**BANKING CORPORATION—**

section does not apply to stockholder of.....	66
nor to officer.....	66

**BEHALF—**

a defendant may testify.....	41, 128
a co-plaintiff or co-defendant.....	130
testimony in, defined.....	128
effect of.....	129
when competent.....	134
rule as to extraneous facts.....	142
claimant against estate.....	106
of administrator.....	76
of executor.....	102, 106, 109, 118

**BENEFICIARIES—**

incompetent as witnesses.....	77, 78
when competent.....	161
release of interest.....	161

**BOOKS OF ACCOUNT—**

are competent evidence.....	116
-----------------------------	-----

	PAGE
BOOKS ON ACCOUNT— <i>Continued.</i>	
how proved.....	116
entries in.....	117
BRIBERY—	
witness must testify to.....	38
CHILD—	
as witness .....	13
CLERGYMEN—	
communications to, privileged.....	197
CLAIMS AGAINST THE ESTATE. (See DISPUTED CLAIMS.)	
when claimant may testify on accounting.....	106
bill for, to be scrutinized.....	107
for services.....	109
by administrator, on his accounting.....	132
by executor.....	109
testimony as to value of services.....	111, 112
what conversations incompetent.....	119
declarations of deceased.....	137
testimony affirming or negating.....	139
exceptions to rule.....	141
CLERK—	
attorney's, cannot testify to communications.....	165, 166
CLIENT. (See ATTORNEY.)	
CO-DEFENDANT.	
competent as a witness.....	48
testimony in behalf of.....	130
CODICIL. (See PROCEEDINGS UNDER THE WILL.)	
CO-PLAINTIFF—	
testimony in behalf of.....	130
COMMITTEE—	
of lunatic.....	66
COMPETENCY OF WITNESS. (See WITNESS.)	
CONFESSIONS—	
statute regulating.....	211
must be corroborated.....	211

	PAGE
CONFESSIONS— <i>Continued.</i>	
preliminary.....	211
by member of an aggregate corporation.....	212
knowledge of language requisite.....	213
weight of.....	216
weight of, for jury.....	216
identity of declarant necessary.....	217
must be voluntary.....	217
induced by threats or compulsion.....	220
illustrations.....	222
threats or promises made indirectly.....	225
induced by promise of reward or favor, or given under stipulation.....	226
of guilt of other than the crime charged under inducements as to the latter.....	231
inducements by one in authority.....	232
made under duress.....	233
induced by artifice or fraud.....	235
made while under arrest.....	237
made before coroner.....	241
judicial.....	244
how taken.....	246
unavailable for defence.....	248
where court holds preliminary examination to determine competency .....	246
COMMUNICATIONS. (See CONVERSATIONS; PRIVILEGED COMMUNICATIONS; PERSONAL TRANSACTIONS.)	
CONFIDENTIAL COMMUNICATIONS. (See HUSBAND AND WIFE; COMMUNICATIONS.)	
CONVERSATIONS. (See PRIVILEGED COMMUNICATIONS.)	
with deceased, when incompetent....	66, 75, 118
when competent.....	120
legatees cannot testify to.....	77, 78, 118
when competent.....	157, 161
beneficiaries incompetent.....	77, 78
when competent.....	161
heirs and next of kin incompetent.....	79, 80
with agent of deceased.....	84

	PAGE
<b>CONVERSATIONS—Continued.</b>	
when agent may give.....	84
servivor or joint maker of note.....	87-94
definition of.....	118
against interest competent.....	123
as to gifts <i>inter vivos</i> .....	100, 103, 104
as to gifts <i>causa mortis</i> .....	101, 103, 115, 116, 126
in presence of third party.....	123-127
in other than probate proceedings.....	127
in probate proceedings.....	123
by one deriving title or interest.....	133
relates to negative and affirmative.....	138
exceptions to rule.....	141
indirect evidence of.....	142
<b>CONTESTANTS OF WILL—</b>	
“derive title or interest” under the statute.....	133
<b>CONVICT—</b>	
as witness.....	27-29
character, how proved.....	29-31
must be a criminal conviction.....	30
arrests not meant.....	31
accusations not meant.....	31
indictments not meant... ..	31
<b>CO-OFFENDER—</b>	
a competent witness.....	48
<b>CORPORATION—</b>	
statute does not apply to stockholder of banking... ..	66
nor to officer thereof.....	66
actions against.....	103
admissions by members of aggregate.....	212
<b>CORONER—</b>	
statement of accused before .....	241
<b>COUNSELOR. (See ATTORNEY.)</b>	
<b>COURT—</b>	
prescribes mode of taking oath.....	4
may inquire as to belief of witness.....	5
decides competency of witness.....	7

	PAGE
<b>COURT—Continued.</b>	
decides competency of infants.....	14, 18-20
powers of, in.....	18
instructions to infant by.....	19, 20
decides privilege of witness as to disparaging and criminat- ing questions.....	33
powers over cross-examination.....	46, 48
decides competency of witness.....	154
motion to, to strike out testimony.....	154, 155
objection must be made at trial.....	155
decides privileged communications.....	170
when, holds preliminary examination to determine compe- tency of confession.....	248
<b>CREDITORS—</b>	
when, cannot object to an allowance of claims by executors.	75
when competent to testify in action by.....	75
in action against.....	76
in action by administrator in behalf of.....	128
<b>CRIMINAL ACTIONS—</b>	
husband and wife competent for or against each other.....	208
<b>CRIMINATING QUESTIONS. (See DISPARAGING QUESTIONS.)</b>	
<b>CRIMINAL CONVERSATION—</b>	
husband and wife as witnesses.....	208
<b>CROSS-EXAMINATION—</b>	
of witness charged with lack of religious belief.....	24
cannot cross-examine infant, when.....	40
power of court over.....	46, 48
as to disparaging questions.....	32-36, 38
of defendant.....	43, 44
wide range of.....	44-46
of accomplice.....	50, 51
by attorney for administrator or executor.....	102
<b>DEAF AND DUMB. (See WITNESS.)</b>	
<b>DEATH—</b>	
of party since trial, testimony how used.....	161
of all parties does not render evidence competent.....	106

## DECEASED—

PAGE

what is, under the statute.....	68
witness in former trial, testimony of.....	161
when his physical condition cannot be shown.....	80, 105
claim against estate of.....	106-119
transactions with... ..	97-109
conversations with.....	67, 75, 118, 120, 123
between, and third persons.....	122
gifts by.....	101-116
conversation with, by one deriving title or interest.....	133

## DECEDENT. (See DECEASED.)

books of account of.....	116
entries in.....	117
declarations of.....	109, 136, 137

## DECLARATIONS. (See also CONFESSIONS.)

of intestate regarding disputed claim.....	109
effect of, generally.....	136
as to value or amount of his estate.....	137

## DECOYS—

are not accomplices.....	60, 64
--------------------------	--------

## DEFENDANT—

as a witness.....	41-43
disparaging and incriminating questions.....	32-37
failure to testify.....	42
effect of testifying.....	43
credit of, for jury.....	43
cross-examination of.....	43, 44
wide range given on.....	44-46
effect of failure to call witness.....	44
effect of failure to call accomplice or co-defendant.....	44
failure to give evidence of good character.....	44
powers of court over cross-examination of.....	46, 48
accomplice as witness for or against.....	48-50
cross-examination of.....	50, 51
must be corroborated.....	51-54
intent of corroboration.....	54-58
definition of.....	58-60
decoys, detectives, spies.....	60, 64

**DEFENDANT—Continued.**

not rendered competent by testimony of surviving partner..	95, 96, 97, 158
when he has been cross-examined by other side.....	102
in action to avoid a deed.....	102
evidence of admission by.....	103
as to gifts.....	100-103
in actions against corporations.....	103
plaintiff's presence at time of the conversation with deceased,	
effect of.....	119
examination of executor, effect of.....	129
when called by a plaintiff claiming through.....	129
when rendered competent by the testimony of an executor	
or administrator.....	156
when the effect is otherwise.....	158, 159
effect of proof by competent third party.....	159
cannot avail himself of his statement before magistrate....	248
how may be used.....	248

**DERIVING TITLE AND INTEREST—**

incompetency of person.....	66
definition of.....	132
contestants are.....	133

**DEVISEE—**

is an interested person.....	68
witness in action against.....	104
cannot testify to physical condition of deceased.....	105

**DETECTIVES—**

are not accomplices.....	60, 64
--------------------------	--------

**DISPARAGING AND INCRIMINATING QUESTIONS—**

allowance of.....	22-36, 38
exemption from answering.....	32
need not give reason for refusal.....	37
when must answer .....	32-35
when may waive exemption.....	35
when deemed waived.....	35, 36
court decides privilege.....	33
when crime barred by statute of limitations.....	38



	PAGE
<b>DISPARAGING AND INCRIMINATING QUESTIONS—Continued.</b>	
illustrations of cases.....	38
when tends to degrade or disgrace.....	36, 100
who judges of effect.....	37
<b>DISPUTED CLAIMS. (See also CLAIMS AGAINST ESTATE.)</b>	
competency of witness thereon.....	69
incompetency thereon.....	69, 92, 99
claims for services.....	109
<b>DONEE—</b>	
when assignee of.....	93
when not disqualified.....	93, 100, 114
<b>DOWER—</b>	
when interest in disqualifies.....	120
<b>DRUGS—</b>	
when disqualified.....	100, 103, 104
over-indulgence in, by witness.....	27
<b>DUELLING—</b>	
witness must testify thereto.....	39
<b>EXAMINATION—</b>	
testimony of party dying before trial.....	161
<b>EXECUTOR. (See ADMINISTRATOR.)</b>	
statute affecting.....	66
who cannot testify against.....	66
effect of testimony in own behalf.....	66
when cannot testify against an heir.....	72
declarations of, when not evidence.....	73
lessees in actions against.....	73, 74
when cannot testify before surrogate.....	75
when creditors cannot object to allowance of claim by.....	75
in actions against creditors.....	75, 76
legatee cannot testify against, when.....	77
is not interested within the statute.....	80
entitled to commission does not make interested.....	150
action by, to foreclose mortgage.....	85, 86
actions against, on note.....	90, 93
actions by, on note.....	93

	PAGE
<b>EXECUTOR—Continued.</b>	
action against executor of deceased partner.....	94
actions by, to recover goods claimed as gift.....	101
sued in individual capacity.....	102
his accounting .....	106
his claim for services to deceased.....	109
action against, for services to deceased.....	109
action against, for board and services.....	113
effect of exhibiting books of account of deceased.....	118
his own books, when excluded.....	118
may testify in behalf of personal representatives.....	121
also prove execution of will.....	121
settling accounts of deceased.....	129
effect of his testifying on adverse party.....	66, 129
when does not restore competency.....	129
restrictions relating to proceedings by.....	131
cannot invoke the statute, when.....	136
not chargeable with value or amount of deceased's estate by latter's declarations .....	137
negative or affirmative averments .....	138
exceptions to rule.....	141
cannot testify to contents of will when.....	150
surety on bond of, interested under the statute.....	156
when evidence restores competency.....	66, 157
when does not have that effect.....	158
 <b>FORMER ATTORNEY—</b>	
communications to, privileged.....	168
 <b>FORMER CONVICTION—</b>	
does not disqualify a witness.....	27,—29
 <b>GAMING—</b>	
witness must testify to .....	39
 <b>GIFTS CAUSA MORTIS—</b>	
conversations to prove.....	101
evidence to support .....	101, 103
who can make .....	115
are revocable.....	115

	PAGE
<b>GIFTS CAUSA MORTIS—<i>Continued.</i></b>	
what constitutes.....	116
actions by administrators to recover.....	131
actions by executors to recover.....	101
effect of declarations of deceased.....	137
<b>GIFTS INTER VIVOS—</b>	
competency of testimony to support.....	100, 103, 104
incompetency of.....	100
what constitutes.....	113
how supported.....	114
illustrations.....	114
actions by administrators to recover.....	131
actions by executors to recover.....	101
evidence of person through whom title is claimed.....	135
effect of declarations of deceased.....	137
<b>HEIRS—</b>	
are interested within the statute.....	68
when cannot testify.....	79, 80
when can.....	78-81, 120
in actions brought by.....	100
testimony against.....	127
executors may testify in behalf of.....	121
cannot testify against.....	73
in actions against.....	128
<b>HUSBAND—</b>	
inventory of his estate, when not competent.....	75
when next of kin.....	79
when cannot testify.....	74
when can.....	81, 82, 122
when joining with wife in mortgage.....	86
promissory note made to wife.....	88
to suing note in wife's possession.....	90
to wife's claim for services.....	112
may testify to his claim against the estate of his wife, when.....	142, 146
testimony of deceased may be used.....	162

	PAGE
<b>HUSBAND AND WIFE—</b>	
preliminary.....	199
confidential communications of.....	200
what are.....	200
what are not.....	203
may testify for or against each other.....	205
in actions for divorce.....	206
in actions for <i>crim. con.</i> .....	208
in criminal cases.....	208
crimes committed against the other.....	209
<b>IDIOTS—</b>	
as witnesses .....	8, 13
<b>ILLEGAL SALE OF CHOSE IN ACTION—</b>	
witness must testify to.....	38
<b>INCIDENTS OF A TRANSACTION.....</b>	144
<b>INDICTMENTS—</b>	
witness cannot be asked as to.....	31
<b>INFAMOUS PERSON. (See CONVICT.)</b>	
<b>INDEPENDENT FACTS—</b>	
statute governing.....	146
<b>INDIRECT EVIDENCE—</b>	
prohibited.....	143
<b>INFANT—</b>	
when need not be sworn.....	12
as a witness.....	13
over fourteen years of age, effect of.....	14
under that age, presumption as to.....	14
under seven .....	18
true test of competency of .....	14- 18
the court decides competency.....	18- 20
how determined.....	19, 20
instructions to, by court.....	19
<b>INSANE. (See MONOMANIA.)</b>	
when incompetent as witnesses.....	8
when are competent .....	9
when becomes so since last trial.....	161

	PAGE
<b>INSURANCE POLICY—</b>	
action on.....	106
<b>INTEREST—</b>	
successor in .....	66
what does not disqualify witness.....	66, 80
what does disqualify.. ..	68, 80
does not prevent proof of loss in action on insurance policy.	106
when lack of, does not render competent.....	126
<b>INTERESTED PERSONS—</b>	
who are .....	68, 156
cannot testify, when.....	68, 80
when may testify .....	80
as to physical condition of deceased.....	104, 105
as to personal appearance of .....	105
when not yet excluded.....	126
in other than probate cases.....	127
to negative or affirmative.....	138
exceptions to rule .....	141
cannot give indirect evidence.....	143
as to incidents of a transaction .....	144
as to independent facts .....	146
when competency is restored .....	157
when not restored.....	158
effect of evidence of.....	158
evidence of third party .....	159
effect of cross-examination of.....	160
<b>INTERPRETER—</b>	
communications to, privileged .....	167
<b>INTERLOCUTORY PROCEEDINGS—</b>	
not within the statute.....	66
<b>INTOXICATING LIQUORS—</b>	
over-indulgence of witness in.....	27
<b>INQUISITION OF LUNACY—</b>	
effect of, on witness.....	13
<b>LEGATEES—</b>	
are interested persons.....	68

	PAGE
<b>LEGATEES—Continued.</b>	
when incompetent.....	77, 125
cannot testify to physical condition of deceased.....	80, 105
effect on, by executor introducing books of account.....	118
standing on probate of will.....	126, 148, 149
when interest released.....	157, 161
<b>LIFE INSURANCE POLICY—</b>	
proof of loss in action on, when competent.....	106
<b>LIQUORS—</b>	
over-indulgence of witness in.....	27
<b>LUNATICS—</b>	
as witnesses.....	8-13
effect of inquisition of.....	13
lucid intervals.....	13
monomania.....	10
committee of, under section 829 of Code.....	66
<b>MAKER OF NOTE. (See PROMISSORY NOTES.)</b>	
<b>MARITAL RELATIONS. (See HUSBAND AND WIFE.)</b>	
<b>MARRIAGE. (See HUSBAND AND WIFE.)</b>	
<b>MENTAL CONDITION—</b>	
of deceased, beneficiary cannot show.....	80, 105
when physician cannot show.....	191
<b>MONOMANIA—</b>	
effect of, on competency of witness.....	10
<b>MORTGAGEES AND MORTGAGORS—</b>	
when within the statute.....	85, 86
when competent.....	85, 86
as to transactions with deceased.....	130
<b>MOTIONS—</b>	
not within the statute.....	66
to strike out incompetent testimony.....	154, 155
<b>NARCOTICS—</b>	
over-indulgence in, by witness, effect of.....	27

## NEGATIVE AND AFFIRMATIVE—

prohibition of statute includes.....	138
exceptions to rule.....	141

## NEXT OF KIN—

when incompetent as witnesses.....	79
husband is, of wife.....	79

## NOTES. (See PROMISSORY NOTES.)

## OATH—

witness must take.....	2
infant need not, when.....	2
definition of.....	3
mode of taking.....	3, 4
on the Gospels.....	4
power of court to prescribe.....	4
statute regarding.....	4
when witness has no religious belief.....	4
witness may be asked as to the peculiar ceremonies of, he considers binding.....	5
irregularly administered.....	5

## OBJECTIONS—

to competency of witness.....	151
must not be too general.....	152
must be made promptly.....	154
need not be renewed.....	154
unless made in trial unavailable on appeal.....	155
cross-examination does not waive right of.....	156
testimony of physicians in probate proceedings.....	192, 193

## OFFICER—

of banking corporation, without the statute.....	66
--	----

## PARTITION SUIT—

executors cannot testify for heirs in.....	72
what communications in, excluded... ..	119

## PARTNERS—

evidence in against, on promissory note.....	89
actions by, against executors of a firm.....	92

	PAGE
<b>PARTNERS—Continued.</b>	
one, is a "survivor" within the statute.....	94
one holding himself out as such within the statute.....	94
actions by survivors.....	94
actions against survivor.....	95
testimony of executor of, effect of.....	96
actions against deceased.....	94
actions between representatives of deceased.....	95
testimony of survivor does not render adverse party competent.....	158
<b>PARTNERSHIPS. (See PARTNERS.)</b>	
<b>PATIENT—</b>	
may waive privilege as to physician.....	193
<b>PERJURY—</b>	
effect of conviction of, on witness.....	40
<b>PERSON IN INTEREST. (See INTERESTED PERSONS.)</b>	
<b>PERSONAL REPRESENTATIVES—</b>	
actions by, on promissory notes.....	88, 130
actions between, of deceased partners.....	95
executors may testify in favor of.....	121
may waive privileges.....	179, 192, 193
<b>PERSONAL TRANSACTIONS—</b>	
defined.....	97
illustrations.....	98
claims against estate.....	109
include the negative and affirmative.....	138
exceptions to rule.....	141
include indirect evidence.....	142
incidents of.....	144
independent facts.....	146
in proceedings under the will.....	148
<b>PENITENT—</b>	
communications to clergymen privileged.....	197
may waive.....	198



**PHYSICAL CONDITION—**

of deceased, when cannot be shown.....	104, 105, 110
administrator may testify to.....	105

**PHYSICIAN—**

cannot show professional treatment.....	110
can testify in favor of nurse for services.....	110
entries in books of account of.....	117
diary as evidence.....	117
register of.....	118
communications to, privileged.....	182
what are privileged.....	189
what are not.....	186
in probate proceedings.....	191
as to testimony tending to disgrace memory of the deceased.	193
cannot show mental condition of deceased.....	191
objection to testimony of.....	192
waiver of privilege.....	193

**PRELIMINARY..... 1****PRIVILEGED COMMUNICATIONS. (See also HUSBAND AND WIFE; PHYSICIANS; CLERGYMEN.)**

preliminary.....	164
to an interpreter.....	167
to a stenographer.....	165
to an attorney.....	165
to an attorney's clerk.....	165, 166
to law student.....	167
to one not licensed.....	167
what relations must exist.....	167
cessation of relations.....	168
who decides relationship and privilege.....	170
what are not privileged.....	174
what are.....	170
on probate of will.....	178
waiver.....	179

**PROBATE PROCEEDINGS. (See PROCEEDINGS UNDER THE WILL.)****PROCEEDINGS UNDER THE WILL—**

subscribing witness to, or codicil.....	104
---	-----

	PAGE
<b>PROCEEDINGS UNDER THE WILL—<i>Continued.</i></b>	
executor may prove execution of.....	121
conversation with deceased excluded.....	118
between deceased and third parties.....	123
legatee incompetent to testify to.....	126
contestants “derive title and interest”.....	133
prohibitions apply to executor.....	148
who cannot testify.....	148
legatees.....	149
when interest released.....	151
attorneys....	178
waiver.....	179
physicians.....	191
relationship decided by court.....	170
communications to physicians.....	182
what are privileged.....	186
what are not.....	189
in probate proceedings.....	191
objections to testimony.....	192
waiver.....	193
communications to clergymen.....	197
<b>PROFESSIONAL COMMUNICATIONS. (See ATTORNEY ; PHYSICIAN ; CLERGYMAN.)</b>	
<b>PROMISSORY NOTES—</b>	
survivors or joint makers incompetent.....	87
actions on.....	89, 130
when not incompetent.....	130
actions on, by executors.....	93
actions on, against executors.....	90, 93
actions by survivor or joint maker.....	87-94
actions on, by personal representatives of partners, are.....	130
<b>PROOFS OF LOSS—</b>	
on insurance policy, competent.....	106
<b>PUBLIC PEACE—</b>	
witness must testify to crimes against.....	40
<b>RELEASE OF INTEREST—</b>	
of legatee, effect of.....	161

	PAGE
<b>RELIGIOUS BELIEF—</b>	
of witness.....	20
defect of.....	20-23
true test of.....	21-23
unbelief, how proved.....	23-25
<b>REPLEVIN SUIT—</b>	
evidence in .....	100
<b>RENEWAL OF OBJECTION—</b>	
when not required.....	154
<b>SECTION 828 OF THE CODE.....</b>	66
<b>SECTION 395, CRIMINAL CODE.....</b>	212
<b>SECTION 829 OF THE CODE OF PROCEDURE.....</b>	66-161
application of.....	66-68
applies to Surrogate Courts.....	67
to matters of probate.....	67
not to motions or interlocutory proceedings.....	66
to examinations under sections 2706, 2710 of the Code.....	68
does not apply to a stockholder or officer of banking corporation.....	66
application of.....	67
interest that disqualifies.....	68
interest that does not.....	80
mortgagors and mortgagees.....	85
to survivors.....	66
committee of lunatics.....	66
parties in interest.....	66
administrators.....	66
executors.....	66
promissory notes.....	87
partnerships.....	94
personal transactions.. ..	97
as to gifts.....	101, 103
gifts <i>inter vivos</i> .....	113
gifts <i>causa mortis</i> .....	115
claims against estate.....	109
books of account.....	116
incompetent conversations under.....	118

	PAGE
SECTION 829 OF THE CODE OF PROCEDURE— <i>Continued.</i>	
competent conversations.....	120
conversations between deceased and third parties.....	122
rule in other than probate cases.....	127
testimony in own behalf.....	128
in behalf of co-plaintiff.....	130
in behalf of co-defendant.....	130
in administration.....	131
deriving title or interest.....	66, 132
declarations of deceased.....	136
negative and affirmative... ..	138
exceptions to rule.....	141
indirect evidence.....	142
incidents of a transaction.....	144
independent facts.....	146
proceedings under the will.....	148
legatees as witnesses.....	149-151
objections to incompetency of witness.....	151
must be taken when.....	154
need not be renewed.....	154
if not taken at trial, effect of.....	155
cross-examination no waiver.....	156
competency restored.....	157
when not restored.....	158
testimony by competent third person or disinterested witness	159
effect of cross-examination.....	160
SECTION 830 OF THE CODE OF PROCEDURE.....	161, 162
must have been parties before.....	162
must have been cross-examined.....	162
SECTION 831 OF THE CODE OF PROCEDURE.....	199-209
SECTION 832 OF THE CODE OF PROCEDURE.....	27-29
SECTION 833 OF THE CODE OF PROCEDURE.....	197
SECTION 834 OF THE CODE OF PROCEDURE.....	182
SECTION 835 OF THE CODE OF PROCEDURE.....	165
SECTION 836 OF THE CODE OF PROCEDURE....	179, 181, 193, 198
SECTION 837 OF THE CODE OF PROCEDURE.....	32, 38

	PAGE
SECTION 839 OF THE CODE OF PROCEDURE.....	212
SECTION 2706 OF THE CODE OF PROCEDURE—	
statute applies to.....	68
SECTION 2710 OF THE CODE OF PROCEDURE—	
statute applies to.....	68
SERVICES. (See CLAIMS AGAINST ESTATE.)	
STATEMENT—	
of accused before coroner.....	241
before magistrate.....	244
how taken.....	246
STENOGRAPHER—	
when cannot divulge communications.....	165
STIPULATION—	
confession under.....	226
evidence given under.....	226
STOCKHOLDER—	
of banking corporation without the statute.....	66
statute strictly construed thereto.....	77
of aggregate, admissions by.....	212
SPIES—	
are not accomplices.....	60
SUBSCRIBING WITNESS—	
where cannot testify to execution of the will.....	149
attorney, when can.....	181
SUCCESSOR IN INTEREST—	
statute regarding.....	66
SURETY—	
on bond of non-resident executor, interested.....	156
SURVIVOR—	
when a partner is.....	94
ostensible partner is.....	94
witness against, incompetent.....	66, 95
actions against.....	95
testimony of.....	96
effect of in own behalf.....	66

	PAGE
<b>TESTIMONY IN OWN BEHALF—</b>	
by defendant.....	42, 43
defined.....	128
effect of.....	129
when competent.....	134
as to extraneous facts.....	142
an executor on his accounting.....	106
<b>THIRD PERSONS—</b>	
between deceased and.....	123-127
in other than probate cases.....	127
heard by agents.....	167
heard by interpreters.....	167
where others overhear attorney and client.....	167
of disinterested witness.....	159
of a competent.....	159
between deceased and his wife.....	150
executor cannot testify as to declarations of deceased as to, in sustaining his payment of claim of.....	75
<b>TITLE—</b>	
deriving interest or.....	66
defined.....	132
one claiming under deceased.....	80
<b>TRANSACTIONS. (See PERSONAL TRANSACTIONS.)</b>	
<b>TRIAL COURT. (See COURT.)</b>	
<b>TRUSTEES—</b>	
of religious or charitable corporations are not within the statute.....	72
general, are within.....	72, 119
in actions by, when husband competent.....	122
<b>WAIVER—</b>	
of privileged communications by client.....	179
one of several clients.....	181
by patient.....	193
by penitent.....	198
as to disparaging questions.....	35, 193
by parties in interest.....	193
by widow.....	193

WAIVER—*Continued.*

PAGE

by personal representatives.....	179, 191, 193
by executors.....	193
husband.....	193
by any heirs at law.....	193
by next of kin.....	193
when testator has waived.....	181

WIDOW—

when incompetent as a witness.....	69, 70
when cannot testify to her marriage.....	74
when is competent.....	71, 81, 82, 100, 135
as to gifts to, by deceased.....	100
as to gifts <i>causa mortis</i> .....	101
against heirs in action to set aside deed.....	100
when amannensis of deceased.....	107
when interpreter for deceased.....	150
dower interest disqualifies.....	120
on reference of her claim.....	144
when entitled to inchoate right of dower.....	151
when testimony of deceased husband to be used.....	162

WIFE. (See HUSBAND AND WIFE.)

when incompetent as a witness.....	124, 126
when competent.....	133
of son of deceased competent.....	151

WILL. (See PROCEEDINGS UNDER THE WILL.)

WITNESS—

oath of.....	2
how taken.....	3
general competency of.....	5, 7
incompetency in general.....	7
idiots as.....	8-13
infancy, effect of.....	2-13, 20
lunatics as.....	8
monomania, effect of.....	10
interest does not disqualify.....	66
incompetency must be objected to.....	5, 6
competency for trial court.....	7
incapacity of.....	22

WITNESS—*Continued.*

PAGE

when unknown.....	5
defect of religious belief.....	20-23
true test of .....	21
how proved.....	23-25
physical incapacity of.....	25
deaf and dumb as.....	25, 26
weakness of memory of.....	26
indulgence in drugs by.....	27
liquors.....	27
convict or infamous person.....	27-29
how conviction shown.....	29-31
must be a criminal conviction.....	30
in another state, effect of.....	30
arrests and accusations not competent.....	31
nor indictments.....	31
disparaging and criminating questions.....	32
exemption from answering .....	32, 38
when not exempt .....	32
court decides privilege .....	33, 37
is personal to .....	34, 35, 37
need not give reason for refusal.....	37
prosecutor cannot avail of it.....	34
his counsel may.....	34
may waive.....	35
when privilege deemed waived .....	35, 36
when crime barred by limitation .....	38
illustration of cases.....	36
questions tending to degrade or disgrace.....	36
who judges of the effect.....	37
as to illegal sale of thing in action .....	38
as to bribery ... ..	38
duelling .....	39
gaming .....	39
crimes against public peace.....	40
defendant as .....	41-43
failure to testify .....	43
effect of testifying .....	43
credit for jury.....	43



WITNESS—*Continued.*

PAGE

cross-examination of.....	43, 44
wide range allowed.....	44-46
effect of defendant's failure to call.....	44
failure to call accomplice.....	44
failure to call as to good character.....	44
power of court over cross-examination of.....	46-48
accomplice as... ..	48-50
definition of.....	58-60
cross-examination of... ..	50, 51
must be corroborated.....	51-54
extent of corroboration.....	54-58
decoys, detectives, spies.....	60-64
under section 829 .....	66-161
preliminary .....	65
the section.....	66
executor under.....	66
administrator under.....	66
committee of lunatic.....	66
survivor.....	66
application of section.....	66-68
interest that disqualifies.....	68-80
illustrations.....	69-79
must be a fixed interest .....	70, 71
period of acquiring immaterial .....	70
a possible interest, effect of.....	71
stockholder or officer of banking corporation.....	77
trustees within statute.....	72, 119
of charitable and religious corporations are not within.....	72
legatees, when incompetent.....	77-78
heirs and next of kin.....	78-80
interest that does not disqualify.....	80-83
agents .....	83, 84
mortgagors and mortgages .....	85-87
regarding promissory notes.....	87-94
partners and partnerships.....	94
personal representatives of partners.....	95
survivor of partners .....	94, 96
in disputed claims.....	69, 92, 99, 100

WITNESS—*Continued.*

widow as. (See WIDOW.)	
wife as. (See WIFE.)	
as to gifts.....	100, 101
in replevin suit.....	100
after cross-examination.....	102
in actions against corporations .....	103
against devisee.....	104
subscribing witness to will or codicil.....	104
as to physical condition or appearance of deceased .....	105
executor upon his accounting .....	106
as to declarations of deceased to sustain payment of claim...	75
in action for trespass <i>quare clausum</i> .....	106
as to proof of loss on policy of insurance.....	106
by assignee of executor .....	106
in actions brought by administrators.....	107
by assignee of plaintiff.....	107
when one defendant alive.....	107
after death of, before trial.....	107
in claim for conversion.....	108
by one heir against another.....	108
in injectment.....	108
claim against estate.....	109
claim for services.....	109
as to gifts <i>inter vivos</i> .....	113
gifts <i>causa mortis</i> .....	115, 126
books of accounts.....	116
what conversations excluded.....	118
what competent.....	120
conversation against interest.....	122
between deceased and third parties.....	123, 127
in other than probate cases.....	127
heard by agents.....	167
by interpreters.....	167
when others overhear attorney and client.....	167
disinterested witness, as to.....	159
of a competent third person, as to.....	159
deceased and wife.....	150
in partition.....	125

WITNESS—*Continued.*

PAGE

testimony in own behalf.....	128
in behalf of co-plaintiff or defendant.....	130
in proceedings relating to executors and administrators.....	131
deriving title or interest.....	132
declarations of deceased.....	75, 136
negative and affirmative.....	138
exceptions to rule.....	141
indirect evidence.....	142
incidents of a transaction.....	144
independent facts.....	146
proceedings under the will.....	148
legatees as.....	149
when subscribing witness incompetent as to execution of will.....	149
release of interest.....	151, 161
objections to competency.....	151
must be made on trial.....	155
cross-examination no waiver of objection.....	156
competency restored.....	159
when not.....	158
effect of cross-examination.....	160
under section 830.....	161
privileged communications.....	164
what are.....	170
what are not.....	174
communications to an attorney.....	165
what relations must exist.....	167
cessation of.....	168
objections to testimony of.....	169
who decides privilege and relationship.....	170
on probate of will waiver of privilege.....	179
when attorney subscribing witness.....	181
communications to an attorney's clerk.....	165, 166
to a stenographer.....	165
law student.....	167
agent.....	167
interpreter.....	167
to physicians.....	182
what are privileged.....	186

	PAGE
WITNESS— <i>Continued.</i>	
what are not.....	189
physician in probate proceedings.....	191
objections to his testimony.....	192
questions tending to disgrace memory of deceased.....	193
who may waive.....	193
communications to clergymen.....	197
waiver.....	198
husband and wife.....	199
what are confidential communications.....	200
what are not.....	203
for or against the other.....	205
in actions for divorce.....	206
<i>crim. con.</i> .....	208
criminal cases.....	208
crimes against each other.....	209
confessions.....	211
by member aggregate corporation.....	212
knowledge of language requisite.....	213
weight of confession.....	216
for jury.....	216
identity of declarant.....	217
confession must be voluntary.....	217
induced by threats or compulsion.....	220
illustrations.....	222
indirect threats or promises.....	225
by promise of reward or favor.....	226
or under a stipulation.....	226
of guilt other than the crime charged, made under in-	
ducements as to the latter.....	231
inducements by one in authority.....	232
made under duress.....	233
induced by artifice or fraud.....	235
while under arrest.....	237
before coroner.....	241
judicial.....	244
statement, how taken.....	246
unavailable for defence.....	248
court may hold preliminary examination to determine	
competency of.....	248

















